(5)

No. 90-769-CFX
Status: GRANTED

Title: Louise H. Renne, San Francisco City Attorney, et al., Petitioners
v.
Bob Geary, et al.

Docketed:
November 13, 1990

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Aftergut,Dennis

Counsel for respondent: Smith,Arlo Hale

40 printed copies mailed 11/13 and recd. 1/15.

Entry	Date	Note	Proceedings and Orders
1	Oct 1 1990	D	Application (A90-250) for a stay of mandate of the United States Court of Appeals for the Ninth Circuit, submitted to Justice O'Connor.
2	Oct 3 1990		Response to application (A90-250) requested by Justice O'Connor, due October 5, 1990.
3	Oct 3 1990		(A90-250) Joinder in application for stay filed by amicus curiae Tom Bradley.
4	Oct 5 1990		Response to application (A90-250) filed by amici curiae California Democratic Party, et al..
5	Oct 5 1990		Application (A90-250) denied by Justice O'Connor.
6	Nov 13 1990	G	Petition for writ of certiorari filed.
7	Dec 13 1990		Brief amicus curiae of City of San Diego filed.
8	Dec 14 1990		Brief amici curiae of California Democratic Party, et al. filed.
10	Dec 14 1990		Brief of respondents Bob Geary, et al. in opposition filed.
9	Dec 17 1990	G	Motion of California Judges Association for leave to file a brief as amicus curiae filed.
11	Dec 19 1990		DISTRIBUTED. January 11, 1991
12	Jan 2 1991	X	Reply brief of petitioners Louise H. Renne, San Francisco City Attorney, et al. filed.
13	Jan 14 1991		Motion of California Judges Association for leave to file a brief as amicus curiae GRANTED.
14	Jan 14 1991		Petition GRANTED.
			**********
15	Feb 27 1991		SET FOR ARGUMENT TUESDAY, APRIL 23, 1991. (3RD CASE)
16	Feb 28 1991	G	Motion of California Judges Association for leave to file a brief as amicus curiae filed.
17	Feb 28 1991		Joint appendix filed.
18	Feb 28 1991		Brief of petitioners Louise H. Renne, San Francisco City Attorney, et al. filed.
19	Mar 12 1991		Record filed.
		*	Certified copy of original record and proceedings received. (Box).
20	Mar 18 1991		Motion of California Judges Association for leave to file a brief as amicus curiae GRANTED.
22	Mar 19 1991	G	Motion of California Democratic Party, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
21	Mar 22 1991		CIRCULATED.

No. 90-769-CFX

Entry	Date	Note	Proceedings and Orders
23	Apr 1 1991		Motion of California Democratic Party, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
24	Apr 3 1991	X	Brief amici curiae of California Democratic Party, et al. filed.
25	Apr 3 1991	X	Brief amici curiae of ACLU, et al. filed.
26	Apr 3 1991	X	Brief of respondents Bob Geary, et al. filed.
27	Apr 15 1991	X	Reply brief of petitioners Louise H. Renne, San Francisco City Attorney, et al. filed.
28	Apr 23 1991		ARGUED.
29	Apr 23 1991		Letter from Counsel for the petitioner received and distributed.

(1)

90-769
No.

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUISE H. RENNE
City Attorney
Counsel of Record
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
Telephone: (415) 554-4213
Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does the California Constitutional provision prohibiting political parties from endorsing, supporting or opposing candidates for nonpartisan office violate the First Amendment?

LIST OF ALL PARTIES

Petitioner Louise H. Renne is the City Attorney for the City and County of San Francisco. Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. As such, it is responsible for conducting federal, state and local elections within its jurisdiction. The remaining petitioners, sued in their official capacities, include the Mayor and the Registrar of Voters of the City and County of San Francisco. Petitioner Board of Supervisors, also sued in its official capacity, is the legislative body of the City and County. Although the validity of a provision of the California Constitution is at issue in this case, neither the State of California, nor any of its officers, were served or appeared.

Respondents Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, and Terence Faulkner are residents and registered voters of the City and County of San Francisco. Respondent Election Action identifies itself as an organization dedicated to placing measures on the ballot by initiative, and to campaigning for and against ballot propositions. Respondent Sudi Trippet is the coordinator of Election Action.

TABLE OF CONTENTS

	Page
Question Presented	i
List Of All Parties	ii
Table Of Contents	iii
Table Of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory, Etc., Provisions Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	4
This Case Presents An Important Question Of Federal Law Affecting The Very Nature Of Local Government And The Judiciary In California	4
California Has A Compelling Interest In Preserving Nonpartisan Local Elections By Banning Official Party Endorsements	6
A Ban On Party Endorsements Is The Least Restrictive Alternative Consistent With The Preservation Of Nonpartisanship	14
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page

Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) 12, 13, 14

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 8, 14, 15, 17

Concerned Democrats of Florida v. Reno, 458 F.Supp. 60 (S.D.Fla. 1978) 6

Eu v. San Francisco Democratic Central Comm., 489 U.S. 214 (1989) 11

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 13, 14

Oregon v. Mitchell, 400 U.S. 112 (1970) 5

Stevenson v. State Board of Elections, 794 F.2d 1176 (7th Cir. 1986) 17

Storer v. Brown, 415 U.S. 724 (1974) 11, 17

Unger v. Superior Court, 102 Cal.App.3d 681 (1980) 4

Unger v. Superior Court, 37 Cal.3d 612 (1984) 5

Statutes

United States Constitution:
- Article IV, section 4 (Guarantee Clause) 6
- First Amendment 5, 6, 7
- Tenth Amendment 6

United States Code:
- 5 U.S.C. § 7324 (Hatch Act) 8

California Constitution:
- former Article II, section 2¾ 4
- former Article II, section 6 4
- Article II, section 6(a) 5
- Article II, section 6(b) ..... *passim*

TABLE OF AUTHORITIES

STATUTES

Page

California Elections Code:
- Section 35 12
- Section 37 16
- Section 605 13
- Sections 6430 *et seq.* 12
- Sections 8500-8945 12
- Sections 9000-9510 12
- Sections 9600-9745 12
- Sections 9750- 9855 12
- Section 10000 12
- Section 10007 13
- Section 10010.5 13
- Section 10012 16
- Section 10200.5 16

California Revenue and Taxation Code:
- Sections 18701 *et seq.* 13

California Miscellaneous Statutes:
- Statutes of 1913, chapter 690 ..... 4, 8

California State Voters Pamphlet, June 1986:
- Proposition 49 10

Florida Statutes Annotated:
- Section 105.071 6

Montana Codes Annotated:
- Sections 13-35-231, 3-10-201(4) 6

South Dakota Codified Laws Annotated:
- Section 12-9-2 6

Miscellaneous:
- *The Federalist,* (Cooke ed. 1981) 7
- Owens, J., Constantini, E., and L. Wechsler, *California Politics and Parties* (1969) 8
- Tribe, L., *American Constitutional Law* (2d ed. 1988) .. 6

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Louise H. Renne, City Attorney for the City and County of San Francisco, *et al.*, respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Ninth Circuit is reported at 911 F.2d 280, and is reprinted in Appendix A hereto, p. A-1.

The initial Ninth Circuit opinion is reported at 880 F.2d 1062, and is reprinted in Appendix B hereto, p. A-67. The order granting the petition for rehearing and setting a rehearing *en banc* is reported at 895 F.2d 1230, and is reprinted in Appendix C hereto, p. A-113.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) is reported at 708 F.Supp. 278, and is reprinted in Appendix D hereto, p. A-114.

JURISDICTION

Respondents brought this suit on September 11, 1987, in the Northern District of California invoking federal jurisdiction under 42 U.S.C. Sections 1983 and 1985. The District Court's jurisdiction was based on 28 U.S.C. Sections 1331 and 1343. On April 27, 1988, the Northern District issued its judgment in favor of respondents on their third cause of action, the subject of the instant proceeding. *See* Appendix D, p. A-114, *infra*.

On petitioners' appeal, the Ninth Circuit, on July 24, 1989, entered a decision reversing the Northern District's judgment. *See* Appendix B, p. A-67, *infra*. Rehearing *en banc* was granted on February 6, 1990. *See* Appendix C, p. A-113, *infra*. The *en banc* decision, affirming the Northern District's judgment, was issued August 14, 1990. *See* Appendix A, p. A-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

1. Article II, section 6, of the California Constitution provides as follows:

> (a) All judicial, school, county, and city offices shall be nonpartisan.
>
> (b) No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

2. Article IV, section 4, of the United States Constitution (the Guarantee Clause) provides as follows:

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

3. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondents filed suit against the City and various City officials in 1987, alleging three causes of action. At issue here is the third cause of action, which alleged that Article II, section 6(b), of the California Constitution violates the First Amendment. Section 6(b) provides that "[n]o political party or party central committee may endorse, support or oppose a candidate for nonpartisan office."

Respondents' motion for partial summary judgment on the third cause of action was granted by the Hon. Alfonso J. Zirpoli, by order dated April 27, 1988. The City's subsequent motion to vacate the judgment was denied, and the City filed its notice of appeal on June 22, 1988.

On June 24, 1989, a three-judge panel of the Ninth Circuit issued a decision upholding the constitutionality of section 6(b). The Ninth Circuit granted a rehearing *en banc* at Respondents' request on October 13, 1989. The eleven-judge *en banc* court issued its decision on August 14, 1990, reversing the panel's decision.

Appendix A

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun: Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 25, 1990.

Decided Aug. 14, 1990.

As Amended Aug. 31, 1990.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, Chief Judge, WALLACE, TANG, SCHROEDER, ALARCON, REINHARDT, BRUNETTI, KOZINSKI, LEAVY, FERNANDEZ and RYMER, Circuit Judges.

GOODWIN, Chief Judge:

Since at least 1913, California by statute or state constitutional provision has made all city, county, school, and judicial offices nonpartisan. Political parties have no control over the nomination or election processes for those offices. Prior to 1986, however, no law prohibited political party endorsements of candidates running for such offices. Nevertheless, because the legal status of such endorsements was unclear, political parties did not endorse candidates in 75% of California counties. In 1986, the people of California voted overwhelmingly to adopt Proposition 49, which amended the state constitution to formalize the ban on political party endorsements: Article II, § 6(b) provides that "[n]o politi-

cal party or party central committee may endorse, support or oppose a candidate for nonpartisan office."

Plaintiffs-appellees in this case are ten registered voters of the City and County of San Francisco, an organization of registered voters, and one of that organization's officers. The basis of their complaint as it relates to this appeal was the refusal of the City and County of San Francisco and the San Francisco Registrar of Voters (appellants) to permit official political party and party central committee endorsements to be printed in the San Francisco Voter Pamphlet prepared for elections scheduled June 2 and November 3, 1987. Appellants based their refusal to print such endorsements on the language of Article II, § 6(b).

On September 11, 1987, plaintiffs-appellees filed suit, and in their third cause of action challenged the constitutionality of § 6(b) and sought injunctive and declaratory relief. They alleged that § 6(b) violates the rights of political parties and their members to free speech and association under the first and fourteenth amendments of the Constitution[1] and to equal protection under the fourteenth amendment.

On April 27, 1988, the district court granted the plaintiffs' motion for partial summary judgment with regard to their third cause of action 708 F.Supp. 278, relying in large part on the reasoning of state Supreme Court Justice Grodin's concurring opinion in *Unger v. Superior Court*, 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238 (1984).[2] On May 6, 1988, the city moved to vacate the district court's judgment and was unsuccessful. This appeal followed.

---

[1] The first amendment is made applicable to the states through the fourteenth amendment. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n. 43, 102 S.Ct. 3409, 3422, 73 L.Ed.2d 1215 (1982); *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

[2] In *Unger*, a plurality of the Court held that the state constitutional provisions making city, county, school, and judicial offices nonpartisan did not prohibit the making of endorsements by political parties. Justice Grodin wrote separately in order to express his view that a ban on such endorsements would violate the first amendment.

The original panel of this court reversed the judgment, holding that California's compelling interest in preserving its nonpartisan system of government for local and judicial offices justified the infringement of the plaintiffs' first amendment rights effected by § 6(b). 880 F.2d 1062. We took this case en banc in order to reconsider the panel's decision. Upon reconsideration, we affirm the decision of the district court.

The broad authority of the states to prescribe the procedures governing local elections "does not extinguish the State's responsibility to observe the limits established by the first amendment rights of the State's citizens." *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 (1989). In reviewing a challenge to a provision of a state's election laws, we first consider whether the provision burdens rights protected by the first and fourteenth amendments. *Id.* If the enactment at issue impairs the first amendment rights of political parties and their members, "it can survive constitutional scrutiny only if the State shows that it addresses a compelling state interest . . . and is narrowly tailored to serve that interest." *Id.* 109 S.Ct. at 1019-20 (citations omitted); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

It is indisputable that the restrictions embodied in § 6(b) implicate appellees' first amendment rights. The ban on endorsements directly affects political speech, "the inviolability of which rests at the core of the First Amendment." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir.1987), *aff'd*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). As the Supreme Court has made clear, "[a]dvocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy or defeat of legislation." *Buckley v. Valeo*, 424 U.S. 1, 48, 96 S.Ct. 612, 648, 46 L.Ed.2d 659 (1976). And because the exercise of these basic first amendment freedoms traditionally has been through the media of political associations, political parties as well as party adherents enjoy rights of political expression and association. *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957).

Because § 6(b)'s prohibitions do impair appellees' first amendment rights, the burden is on the government to show a compelling state interest justifying the regulation. *Eu*, 826 F.2d at 833 (quoting *Bellotti*, 435 U.S. at 786, 98 S.Ct. at 1421). Appellants declare § 6(b) essential to preserving the nonpartisan nature of California's system of electing local and judicial officials and assert that the State's interest in the "fair and impartial administration of government" is compelling enough to warrant § 6(b)'s ban on partisan endorsements.

Attempting to avoid the constitutional minefield of claiming first amendment restrictions to be justified for the purpose of preventing "undue influence on voters" and guiding the electorate to make sensible choices, *see, e.g., Bellotti*, 435 U.S. at 789-91, 98 S.Ct. at 1422-24, appellants characterize their concern as an interest in the *end product* of § 6(b)'s restrictions on political party speech: i.e., prevention of a return of political party domination of local government and diminished voter confidence in local public officials. *See, e.g.*, Amicus Curiae Brief of Tom Bradley, Mayor of Los Angeles, at 3 (California's concern "does not relate to the impact that endorsements may have on voters' choices but rather to the indirect impact on elected officials' independence from partisan political pressures").

As support the State cites Supreme Court cases upholding limits on campaign contributions and spending, contending that political party endorsements create the same risks of corruption that the Court previously has determined justify governmental regulation of election spending. The analogy is flawed. In its most recent pronouncement in this area, *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court upheld a provision of the Michigan Campaign Finance Act prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections. In its defense Michigan contended that the unique legal and economic characteristics of corporations necessitated some regulation of their political expenditures in order to avoid corruption or the appearance of corruption. *Id.* at 1397. Affirming that, in previous cases, "[w]e . . . have recognized that 'the compelling governmental interest in preventing corruption

support[s] the restriction of the influence of political war chests funneled through the corporate form,' " *id.* (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01, 105 S.Ct. 1459, 1470, 84 L.Ed.2d 455 (1985) (*NCPAC*)), the Court found the Michigan statutory provision a legitimate check upon "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the [state-conferred] corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 1397.

The corruption the Court found properly addressed by the Michigan statute was not of the kind decried by California here. Under the definition applied in past cases, "[c]orruption is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468; *see also Austin*, 110 S.Ct. at 1421 (Kennedy, J., dissenting). "The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468.

By contrast, the Court explicitly has excluded from its definition the kind of conduct California seeks to prevent with § 6(b): "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages . . . can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id* at 498, 105 S.Ct. at 1468. The rationale underlying "the long history of regulation of *corporate* political activity" thus simply is not available as a justification for the complete suppression of speech by political parties, regardless of whether the elections in question are partisan or nonpartisan in nature. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256, 107 S.Ct. 616, 627, 93 L.Ed.2d 539 (1986) (*MCFL*) (emphasis added). As the Court said in exempting Massachusetts Citizens for Life, a nonprofit organization dedicated to promoting respect for the rights of the unborn, from Federal Election Campaign Act (FECA) prohibitions on corporate expenditures of treasury funds on behalf of federal candidates:

> [such groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

Id. at 259, 107 S.Ct. at 628-29 (emphasis added). That description applies equally well to the political parties targeted by § 6(b).

In *Eu* we considered a similar ban on partisan endorsements before party primaries in California. Finding that "[w]ith the exception of cases upholding laws carefully tailored to proscribe fraud and corruption," the State had "cite[d] no authority for the proposition that the government can regulate the flow of information between political associations and their members," we held that the ban "patently infringe[d] both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." 826 F.2d at 835.

Appellants assert that *Eu* is distinguishable because it involved party endorsements in elections for *partisan* offices and because the state interest advanced here—i.e., in preventing the appearance or reality of "corruption" of nonpartisan officeholders—is more compelling. Having dealt with the latter contention above, we observe with regard to the first that there is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue. *See, e.g.*, 109 S.Ct. at 1020 ("[a]'highly paternalistic approach' limiting what people may hear is generally suspect, but it is particularly egregious where the State censors the political speech a political party shares with its members") (citations omitted); 826 F.2d at 835 (same).

Even if we were to find the state interests underlying § 6(b) compelling, we still would be bound to declare the amendment invalid, because appellants have failed to show that § 6(b) is narrowly tailored to achieve its purported objectives. *See Eu*, 826

F.2d at 834 (citing *Consolidated Edison Co. v. Public Serv. Comm.*, 477 U.S. 530, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980)). The State claims that § 6(b) is narrowly drawn because only political parties and their county central committees are prohibited from endorsing, supporting, or opposing nonpartisan candidates; individuals are not subject to its restrictions. But as we have noted, *supra* at 283, political parties as well as party adherents possess rights of expression and association under the first amendment, and the mere fact that § 6(b) targets the collective rather than the individual voices of party members does not suffice to render it "precisely drawn." *See Bellotti*, 435 U.S. at 777, 98 S.Ct. at 1416 ("[t]he inherent worth of [political] speech . . . does not depend upon the indentity of its source, whether corporation, association, union, or individual").

Even in the campaign contribution and expenditure cases appellants cite as support for their position, the Supreme Court consistently has emphasized the limited nature of the restrictions it has upheld and the availability of alternative avenues of expression for the affected speakers.[3] As the Court observed in *Buckley*, with regard to the narrow provisions of the FECA it found to be constitutional:

> [s]ignificantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and *political parties*.

---

[3] In *Austin*, for example, the Court found the Michigan enactment at issue to be "precisely targeted" to achieve its aims because it "does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." 110 S.Ct. at 1398 (emphasis in original). Similarly in *MCFL*, the Court emphasized that the FECA limitations on corporate political expenditures upheld in its previous cases were "of course distinguishable from the *complete* foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 [98 S.Ct. 1407 55 L.Ed.2d 707] (1978)." 479 U.S. at 259 n. 12, 107 S.Ct. at 628 n. 12 (emphasis added).

424 U.S. at 28-29, 96 S.Ct. at 639-40 (emphasis added). Obviously, the same cannot be said of § 6(b); it imposes a total ban on any partisan gesture of support for or opposition to a candidate. Accordingly, the district court below specifically found that the State could adequately safeguard the interests § 6(b) was designed to protect by less drastic means, including provision for non-partisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates.[4]

We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy, and the State has offered nothing but speculative evidence to

[4] In fact, the California Elections Code features several provisions designed to preserve the non-partisan character of local and judicial elections. To begin with, we note that Section 37 of the Code explicitly forbids party participation in the nomination of candidates for nonpartisan office, defining a "nonpartisan office" as "an office for which no party may nominate a candidate." In addition, the Code contains provisions stating that declarations of candidacy and other nomination papers may not refer to party affiliation (§ 6401.5); the name of the party to which a candidate for nonpartisan office belongs may not appear on the ballot (§ 10200.5); a voter may cast his ballot for a candidate for nonpartisan office without regard to party affiliation (§ 10214); and partisan and nonpartisan offices are to be listed in separate columns on the ballot form (§ 10207). *See Unger,* 37 Cal.3d at 616 (Grodin, J., concurring). *See also* Note, *Local Nonpartisan Elections, Political Parties and the First Amendment,* 87 Colum.L.Rev. 1677, 1698-1700 (1987) (concluding that § 6(b) unconstitutionally burdens first amendment rights and discussing means short of a complete ban on political party involvement in nonpartisan elections states may employ to counteract perceived threats of undue party influence on nonpartisan officeholders and preserve responsiveness of local government to constituent concerns).

§ 6(b) was enacted in 1986; appellants have made no showing that the above-mentioned Election Code provisions have proven inadequate to maintain the nonpartisan character of local and judicial offices.

support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.[5]

We are not unmindful that "the Constitution grants to the States a broad power [to regulate Congressional elections under] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986); *see also Oregon v. Mitchell,* 400 U.S. 112, 124-25, 91 S.Ct. 260, 264-65, 27 L.Ed.2d 272 (1970) (opinion of Black, J., delivering the judgment of the Court) (observing that under the 10th Amendment, one of the powers reserved to the states is the regulation of state elections). But as the Supreme Court has emphasized, the state's power to protect the integrity of its electoral processes "does not justify, without more, the abridgement of fundamental rights, such as the right to vote, see *Wesberry v. Sanders,* 376 U.S. 1, 6-7, 84 S.Ct. 526, 529, 11 L.Ed.2d 481 (1964), or, as here, the freedom of political association." *Tashjian,* 479 U.S. at 217, 107 S.Ct. at 550; *see also Miami Herald v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730

[5] The affidavits by various state officials offered in evidence by appellants fail to demonstrate that "the relative voice of [political parties] has been overwhelming or even significant in influencing" nonpartisan elections, "or that there has been any threat to the confidence of the citizenry" in its nonpartisan officeholders. *See Bellotti,* 435 U.S. at 789-90, 98 S.Ct. at 1422-23. Indeed, as Justice Grodin pointed out in *Unger,* "one might expect that in local elections . . . , local 'special interest' and civic groups would have a greater influence over the electorate than would political parties." 37 Cal.3d at 623-24 n. 4, 209 Cal.Rptr. 474, 692 P.2d 238 (Grodin, J., concurring) (citing Lee, *The Politics of Nonpartisanship* 77, 79 (1960)).

Even if California is correct, and the availability of partisan endorsements *in the future* does produce nonpartisan officeholders more sensitized to party preferences, that result will have been effected through the exercise of informed voter choice—a mechanism with which the State may not interfere out of a concern that, in the absence of regulation, the voters will misperceive their own best interests. *See Bellotti,* 435 U.S. at 791 n. 31, 98 S.Ct. at 1424 n. 31 ("[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").

(1974) and *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) (striking down on first amendment grounds state election laws interfering with newspapers' rights to comment on political candidates); *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (10th Amendment cannot save legislation prohibited by subsequently enacted fourteenth amendment).[6]

Because we find that the ban on partisan endorsements by political parties burdens political speech without being narrowly tailored to serve compelling state interests, we hold that § 6(b) violates the first and fourteenth amendments.[7]

AFFIRMED.

REINHARDT, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins, concurring:

I join fully in Chief Judge Goodwin's opinion for the court. However, in an effort to ensure that no one will be misled by the ostensible teachings of history, I submit this separate concurrence responding to Judge Alarcon's thesis that today's political parties pose a fundamental threat to democratic institutions in California and that their endorsements bring with them the taint of corruption. I also write to comment on the concerns raised in his opinion regarding the independence of California's judiciary.

I

There is always a danger in too facile an application of the principle that important lessons may be learned from past events. The problem is similar to the one we frequently experience with those who claim to be expert in determining the original intent of

---

[6] It is, of course, "irrelevant that the voters rather than a legislative body enacted [§ 6(b)], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 437, 70 L.Ed.2d 492 (1981).

[7] This disposition makes it unnecessary to reach appellees' equal protection claims.

our founding fathers. In both cases, it is the level of generality that is critical, and that so badly confounds the pseudo-experts. In short, "students" sometimes learn the wrong lesson from history —they discern the wrong message not by getting the historical facts wrong but by concentrating on superficial statements or inferences rather than on the fundamental principles that underlie them. For example, it is certainly true, as a matter of historical fact, that the American colonists found it necessary to be vigilant against roving bands of Indians. However, for a modern student of our early history to draw from that fact the lesson that we must today be constantly on the alert against "predatory" Native Americans would be rather foolish. On the other hand, to learn, as a result of our early experience, a more fundamental lesson—namely, that individuals may find it necessary to band together in their common defense—might show a modicum of wisdom.

In the case at hand, it does not take much wisdom to know that, whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties—or even from the Libertarians—but rather from the corrupting influence of money in politics—that is, from massive political contributions. All recent California governors have, of course, been nominated by political parties, while California mayors have, since the days noted by Judge Alarcon, been elected in nonpartisan races. Yet there is no reason to think that recent governors, like Pat Brown, Ronald Reagan, Jerry Brown, and George Deukmejian, have been more subject to corruption, in any form, than mayors, like Pete Wilson, Dianne Feinstein, Tom Bradley, Sam Yorty, and Joe Alioto. In fact, today's problems concerning the lack of integrity in government may well stem in substantial part from the weakening of the political party system, both locally and nationally. Throughout the nation, candidates no longer can look to the party to assume responsibility for the cost of their campaigns. Conversely, parties no longer can impose discipline on individuals elected to office as the party's standard bearers. These days public officials and would-be public officials must go directly to the big monied interests and beg for the funds necessary to finance their campaigns. In modern-day America, there simply is no reason to associate partisanship with corruption.

There is a basic fallacy in Hiram Johnson's notions of reform. Eliminating the middle-man does not do much to solve the fundamental problem of corruption. In fact, in this case it may have exacerbated it. We are told that in the early 1900s the Southern Pacific Railroad was the villain, that it controlled both the legislature and the political parties. Strangely, while Johnson's reforms deliberately weakened the party structure, they left the Southern Pacific wholly untouched, free to contribute, free to endorse, free to promote its own candidates regardless of their ideology. Accordingly, the reforms not only compelled candidates to deal directly with the Southern Pacific and its lobbyists, but made them more dependent on the railroad's contributions.[1] Political reforms are always well intended. Frequently, however, they, like ill-thought-through history lessons, address only the superficial evil and fail to consider the underlying problem.

That is not to say that the people of California do not have the right to use a system of nonpartisan elections for filling local and judicial offices. No one quarrels with that right. But the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected. For nearly eighty years, California's local and judicial elections have been "nonpartisan." Traditionally, and as California has applied the term, a nonpartisan election means that the candidates who appear on the general-election ballot are not selected by political parties. Cal.Elec.Code § 37. Anyone can run in the primary, not just persons registered in a particular political party. *E.g.* Cal.Elec.Code §§ 22836 & 25301. If any one of the primary candidates in a nonpartisan election receives a majority of the votes, he is elected; otherwise, the two individuals who receive the highest number of votes face each other in the general election. Cal.Elec.Code §§ 6611, 6612, & 7202. In any event, all

[1] Of course, as Judge Canby pointed out in his excellent dissent from the original panel opinion, it would not "have been constitutional for California to solve the problem of Southern Pacific dominance by prohibiting the Railway from announcing its support for particular political candidates." 880 F.2d 1062, 1084 (1989).

citizens, regardless of party affiliation, are eligible to participate in all stages of the nonpartisan election process.[2]

California may continue to hold elections that are nonpartisan in the traditional sense. But there is all the difference in the world between refusing to delegate to political parties the decision as to which candidates appear on the general-election ballot and prohibiting political party organizations from announcing their views on the merits of candidates seeking public office. The latter directly infringes on the right of free speech. As the Supreme Court has stated, "[T]he first amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). Prohibitions on endorsements "directly hamper[ ] the ability of a party to spread its message and hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." 109 S.Ct. at 1020. "[I]t is particularly egregious where the State censors the political speech a political party shares with its members." 109 S.Ct. at 1020.

The issue, in short, is not a matter of how to define or structure a "nonpartisan election." It is instead a question of the right of individuals to band together and express their collective views on a matter of public concern.[3] Unless the state can demonstrate a compelling need to do so, it cannot limit such speech. That the

[2] In an election for partisan office, each party chooses its own nominee in a primary election in which all party members are entitled to vote. Cal.Elec.Code § 6610. The candidates whose names are printed on the primary ballot must all be members of the party. Cal.Elec.Code §§ 6401-6402. The party's nominee then contends for office in November against the nominees of the other political parties. It is possible under California law, for an independent to qualify for the general election ballot as well, Cal.Elec.Code § 6800, although with one exception, a state senator from San Francisco, this provision has been of little significance in recent decades.

[3] It would be difficult to surpass the analysis of the free speech issue set forth in Judge Canby's dissent, 880 F.2d at 1082-86. I commend that dissent to anyone interested in the general topic.

speech is collective rather than individual is of no import. The state may no more prevent Republicans in Los Angeles County from announcing their collective position on candidates for nonpartisan office than it could prevent an individual Republican party member from running for a nonpartisan office, or from proclaiming during the campaign that he is a member of the Grand Old Party and that he intends, if elected, to follow its tenets unservingly. Similarly, of course, the state could not prevent members of political parties from voting in an election to select a nonpartisan office-holder. While the state may have a compelling interest in maintaining its nonpartisan election structure for certain offices, there are obvious limits to what it may concern itself with. It may select the form of local government it wishes and prescribe procedures for its implementation; however, it has no compelling interest in limiting the people's right to make informed choices or to select candidates for office on whatever basis they deem relevent.

The dissent's description of California's populist reforms should not inadvertently mislead anyone into believing that Hiram Johnson and his reformers long ago enacted a prohibition against endorsements in nonpartisan elections. The reformers were not that out of touch with our Constitution. To the contrary, political parties were free to make endorsements in nonpartisan races in the period following the Johnson reforms, right up until 1986. Only then did the voters adopt the no-endorsement rule that Judge Alarcon now finds so essential to the preservation of the republic. Until the adoption of the initiative measure in 1986, political parties were free to, and did, endorse in numerous nonpartisan elections. As Justice Mosk wrote in *Unger v. Superior Court*, in California it was "*customary* for the governing bodies of political parties to endorse or assist candidates in elections for nonpartisan office."[4] And prior to 1986, few thought that the

[4] 37 Cal.3d 612, 616, 209 Cal.Rptr. 474, 477, 692 P.2d 238, 241 (1984) (emphasis added). Dissenting in *Unger*, Justice Sims, sitting by designation, discounted the frequency of such partisan activity by stating that it occurred in only 25 percent of the state's counties. His use of statistics, however, was highly misleading. In the study on which Justice Sims relied, Professor Lee noted that the tendency of political parties to participate in nonpartisan elections increased with the population. According to Professor Lee's study, if the counties without significant populations are excluded, the political parties made endorsements in nonpartisan elections in roughly two-thirds of the state's counties. E. Lee, *The Politics of Nonpartisanship* 102-03 (1906).

political process was in any great danger as a result. Thus, historical events of the early 1900s cannot provide the basis for limiting the free speech rights of today's California Democrats, Republicans, and minor party members. Nor can the limitation of that speech be deemed necessary to the proper functioning of the nonpartisan election system. In reaching those conclusions, I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind—almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.[5]

In fact, recent experience tends to suggest that the influence of party organizations is not nearly as great as Judge Alarcon fears. Only a few months ago the California Democratic party made endorsements in the statewide partisan primary for the first time. The endorsed candidates for Governor and Insurance Commissioner, the only two seriously contested statewide posts for which endorsements were made, both lost by substantial margins. In nonpartisan races, the voice of political party organizations is likely to be even less effective. Ordinarily endorsements in those races are made on a local level; there, the endorsing bodies are the county central committees, which are notoriously uninfluential organizations. In any event, in nonpartisan races, as in partisan ones, the party's voice is but one of many that seek, whether for selfish or idealistic reasons, to persuade voters to case their ballots

[5] Former court of appeal justice Winslow Christian's testimony simply presents one experienced individual's policy views on the subject of partisan endorsements in judicial elections. Certainly, those views can no more carry the day for an unconstitutional measure than can the popular vote. In any event, Mr. Christian's statement, like the rest of appellant's case, fails to offer a single fact, pro or con, relating to the making of a partisan endorsement, or its subsequent effect, in a nonpartisan race in California.

one way or the other. The only difference is that in nonpartisan races the party's voice is even more attenuated since its message is directed not only at its own members but at the electorate at large.

As I have already noted, political parties have the same rights as others to make their views known; their speech may not be suppressed unless the state can demonstrate that it is necessary to do so for compelling reasons. *Eu*, 109 S.Ct. at 1019-20. It is also important to note that the result would be no different here even if political parties' endorsements carried great weight and influenced voters inordinately. For speech cannot be prohibited on the ground that it is effective.[6] In any event, in this case those arguing that a compelling governmental interest warrants limiting the right of members of political parties to make known their collective views have completely failed to carry their burden.

II

A

Judge Alarcon's dissent touches on a critical and sensitive subject when it discusses the question of the independence of the California state judiciary—and the threat to that independence that purportedly arises when political parties are free to express their views regarding the qualifications or records of candidates for judicial office. My colleague's argument is paradoxical indeed, and, implicitly but unavoidably, raises the basic question whether judges who are forced to stand for election *can* be independent. The threat to the independence of elected judges stems from the fact that they are dependent for their livelihood and continued employment on the political process. They must all stand for election at one time or another, either initially, shortly after their

[6] Judge Canby has pointed out most articulately that the state's theory that it can prohibit endorsements because voters will be unduly influenced by them constitutes a classic form of state paternalism, and reflects an unwillingness to allow voters to receive information on which, the state believes, they would like to base their decisions. 880 F.2d at 1083.

appointment, or at the end of their first and subsequent terms. Cal. Const. art. VI § 16. Some raise large sums of money and seek support from persons and pressure groups with particular interests that will come before them. Judicial candidates are rated by various interest groups and are questioned about their decisions —sometimes about the very issues listed in Judge Alarcon's dissent. None of this appears to cause my dissenting colleague any concern—except for the fact that *one* of the groups that may endorse a judicial candidate may be a political party organization.

The paradox I find in Judge Alarcon's position lies in the assumption that judges can remain independent though compelled to seek financial contributions and other assistance, including endorsements, from powerful special interests and pressure groups, but that their very integrity may crumble if they ask members of a political party publicly to proclaim their collective support. As far as I am concerned, one can make a plausible argument that judges who must run for election cannot be fully independent—that their decisions on controversial issues will be suspect—that they are too susceptible to pressures arising out of personal concerns.[7] Or, on the other hand, one can argue that good judges, being strong-willed, intellectually disciplined, and highly principled, will disregard the effects of being compelled to seek, and accept, the aid of those whose basic interests are regularly at stake in their courts. But it cannot be seriously argued, in my view, *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who

[7] Retired California Supreme Court Justice Otto Kaus, for example, has publicly questioned whether his decisive vote to uphold California's Victim's Bill of Rights in 1982 might have been influenced by the fact that he was facing a retention election that year. Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348, 351 (1987). Former Justice Grodin, during his retention campaign, made it his "goal to go to bed election night knowing, as best one can know such things, that I did not decide any case differently because of the election. To the best of my knowledge I achieved that goal. But I have to recognize that I may be wrong." Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987).

can truly control his destiny—the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible[8]—*and*, at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

B

We can, of course, learn from history, and the events surrounding recent judicial elections in California shed significant light on the

---

[8] Governors are free to take positions in judicial elections, and at least some do. Governor George Deukmejian served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election. When his view prevailed, he was able to appoint successors whose positions on controversial issues more closely matched his own.

Since our concern here is not with the electoral debate *per se*, but rather with the effect on the post-election performance of public duties, it is interesting to note that some of Governor Deukmejian's remarks in the 1986 campaign were explicitly directed toward the "correction" of what the Governor perceived as errant judicial conduct by sitting justices. Governor Deukmejian initially opposed only Chief Justice Rose Bird, and not Associate Justices Cruz Reynoso and Joseph Grodin. Toward the middle of the campaign, however, as former Justice Grodin tells us, the Governor

> declared that he would be inclined also to vote against Justice Reynoso and myself if our records in death penalty cases did not improve. Still later, in the early fall preceding the election, he announced that he did, indeed, intend to vote against the two of us as well, citing as justification that Justice Reynoso had voted only once to affirm a death penalty judgment and on only five occasions had I done so. There was no analysis of the cases, no argument that the grounds on which we had voted to reverse death penalty judgments were legally insubstantial, and no indication of how many death penalty judgments we would have to affirm to meet with Governor Deukmejian's approval.

Grodin, *supra* note 7, at 367.

problem we are asked to resolve. In the 1986 statewide general election, three members of the California Supreme Court, including the Chief Justice, were voted out of office because a majority of the electorate disagreed with the perceived views of those justices on controversial issues. The election was not one in which either major political party made an official endorsement. However, endorsements there were—and campaign contributions for and against the justices totalling more than eleven million dollars. A wide variety of special interest groups—insurance companies, oil and gas interests, large corporate employers, agricultural conglomerates, prosecutors, and other law enforcement officials—poured money into the campaign coffers of the organizations formed to defeat justices who wrote or joined in opinions those groups deemed harmful to their economic or professional interests. On the other side, personal-injury and criminal defense lawyers who agreed in general with the Court's decisions rallied to the support of the beleaguered judicial officers.

In the months preceding this nonpartisan election, the three embattled justices were forced to appear on television to plead their cases, and to seek the endorsements of powerful newspapers, bar organizations, and prominent lawyers. Most important, however, the justices were compelled to seek large amounts of money from potential campaign contributors so that they could convey their messages to the voters. True, they could have kept silent—but if the people of the state want elections for judges, they must also want a fair and full debate on the issues; and a fair and full statewide debate these days costs many millions—at least if, as was the fact in the 1986 California election, the opponents of incumbent judges conduct a full-scale, paid media campaign with thirty-second spots designed to inflame the passions and prejudices of the voters. Statistics from other states suggest that California's experience in the 1986 race was not unique. Seven million dollars was spent in Ohio's nonpartisan elections for the state Supreme Court that same year. Even back in 1980, three open seats on the Texas Supreme Court generated campaign expenses of nearly two million dollars. Uelman, *California Judicial Retention Elections*, 28 Santa Clara L.Rev. 333, 348 n. 44 (1988).

Money is no less important in the case of California's trial-court judges; a survey conducted by the California Judges' Association is informative in this connection. One judge who responded to the survey wrote, "[M]y 'reasons for winning' . . . are as follows: (1) *Money;* (2) Organization; (3) An early start; (4) *Money;* (5) An 'excellent' candidate; (6) A weak opponent; (7) Excellent public relations and use of media advice; (8) *Money;* (9) Luck." Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 J.L. & Pol. 57, 155 (1985) (emphasis in original). This dependence on contributors may actually affect a trial-court judge more significantly than an appellate judge, since a large portion of the necessary money is contributed by lawyers who may then or later (or indeed, regularly) have cases pending in the candidate's court.[9]

C

In light of the above, the California provision prohibiting endorsements by political parties appears to be a particularly peculiar way of addressing the problem of maintaining judicial independence. Obviously, the dependence of judges on campaign contributions represents a far greater threat to the integrity of California's judiciary than does the possibility that some judicial candidates may be endorsed by political party organizations. Yet

---

[9] It is only natural, of course, for members of the bar to join the fray on both sides, for no one is more interested than lawyers in the question of who will decide controversial cases. Indeed, lawyers constitute the largest single group of contributors to judicial campaigns generally. The excessive judicial reliance on attorney contributions can raise troubling questions about the even-handedness of justice. *See generally* Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich.L.Rev. 382 (1987). At least as disturbing is the role played by law enforcement organizations. Statistics from 1980 show that such organizations are at the top of the list in terms of average contributions. Dubois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?* 70 Judicature 8, 12-13 (1986). Defense counsel may well wonder whether their clients will receive a fair shake from the recipients of that largesse.

the state has not regulated the solicitation of campaign funds by incumbent or would-be judges, even though, as Chief Judge Goodwin points out in the majority opinion, the financial influences condoned by the state of California are not entitled to as much protection under the Constitution as the core political expression the state seeks to suppress. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257-59, 107 S.Ct. 616, 627-29, 93 L.Ed.2d 539 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985). If contributions and endorsements are to be treated differently under the first amendment, one would expect the state to afford greater, not lesser, constitutional protection to the latter.

In actuality, the prohibition of endorsements appears to be counterproductive, for it *increases* the dependence of judicial candidates on campaign contributions. Endorsements permit the judge to get his name before the public in a favorable light at no expense to himself. Shutting off that avenue may well require him to find other means of attempting to make his name a household word in a few short months. Almost all those other means will involve the expenditure of substantial amounts of money. For example, a judge may file a candidate's statement which will be mailed to the voters by the county along with other election material, such as the statewide and local ballot arguments. The rub is that the judge must pay the cost of the mailing, Cal.Elec.Code § 10012, a cost well beyond the means of most judicial officers. In the most recent election in Los Angeles County, the cost—to a candidate for the position of Superior Court judge—of distributing a biographical statement to the voters was over $62,000, and that cost was approximately fifteen percent higher than the cost at the time of the previous election only two years earlier. Campaign costs for *all* means of communication have escalated comparably—and rapidly—and the need for judges and would-be judges to engage in serious fund raising activities continues to grow each year.

Moreover, even if it were constitutionally permissible to ban some forms of speech in judicial campaigns, there is no warrant for singling out political endorsements. In part, this is because the

political parties have as much right to make known their views regarding candidates for judicial office as do the Crime Victims for Court Reform, the Law and Order Campaign Committee, the District Attorneys' Association of California, the National Organization for Women, or the *San Francisco Chronicle,* all of which took official positions in California's 1986 retention election. The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and judicial philosophy. And California's choice must seem particularly irrational to anyone familiar with the regrettable propensity of those who manage judicial campaigns to pander to the voters' lack of familiarity with the processes of the law, and particularly the criminal law. Again California's experience in 1986 provides a telling example:

> [I]magine the power of the 30-second television spot: here was a stomach-turning crime, committed by a person whose humanity was cloaked in blood; here is the mother, or the grandmother, or the daughter of the victim lamenting her loss, and suggesting, or implying, that the California Supreme Court, in its unalterable opposition to the death penalty, and in defiance of the public will, had in reliance upon some unidentified technicality set the defendant loose on the streets. Of course, it was no technicality, but a matter of constitutional or statutory right, and of course the defendant was not turned loose, but returned for retrial—in fact by the time the opposition ran the principal ad I have described, the defendant in the case had already been retried, reconvicted, and sentenced to death. But try explaining all of that effectively in 30 seconds on television, or in any manner sufficient to offset the emotional impact of the opponents' appeal.

Grodin, *supra* note 7, at 366-67. See also Forum, *The Robed Politician,* L.A. Law., Mar. 1979, at 12. Given that many of the arguments befouling today's judicial campaigns are harmful to

the health of the state judiciary, there is little reason to single out political endorsements, which are surely a cut above much that currently passes for "debate on public issues [that is] uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

Finally, anyone familiar with California's judicial elections must be aware that prohibiting official party endorsements cures none of the ills cited by supporters of the ban. First, to the extent that one is concerned about the use of "litmus tests" for judicial candidates, the concern is misdirected. As I have already suggested, party organizations are far less likely to use "single-issue" determinants of judicial fitness than are many powerful interest groups that participate in election campaigns, such as the National Rifle Association, the National Abortion Rights Action League, or the Right to Life Committee. Silencing the voice of political parties serves only to increase the strength of the message being delivered by other groups with narrower or less public-spirited objectives. Under these circumstances, it could well be argued that Judge Alarcon's "frightened incumbent who has been subjected to media criticism for an unpopular decision," *post,* at 313, should welcome the broader perspective the political parties offer and the support their endorsements can bring.

Second, if the concern is rather that endorsements will be made on the basis of political allegiances that have nothing to do with judicial fitness, that is not an appropriate consideration on which to base a measure outlawing speech. Voters are free to accept or reject endorsements made on the basis of political beliefs, just as they are free to base their ultimate choice on their own view of the judicial candidate's political or judicial philosophy. Moreover, it is obvious that the "slate mailers" that frequently substitute for authentic endorsements have even less relation to the character or ability of the candidate. Today's judicial elections, for the trial courts at least, are marked by the widespread use of pseudo-official mailers that contain endorsements of candidates for both partisan and nonpartisan office. Republican candidates for partisan office are listed on slates addressed to Republican voters; Democratic slates contain the name of Democratic candidates and are mailed to Democratic party members. In each case, the

names of the "endorsed" judicial candidates are listed as well. However, the decision as to which candidates will appear on the slate mailers is made not in a democratic manner by the members or officers of an official party organization; instead, it is made by private entrepreneurs, some of whom sell space—that is, endorsements—to the highest bidder.[10] Many of these private slate mailers, despite small print disclaimers, use the name of a political party and appear to the average voter to contain official party endorsements. If political parties were to be prohibited from making endorsements in judicial campaigns, then judicial candidates who might otherwise seek an honest endorsement from a legitimate political party might be compelled to buy spurious party endorsements—to pay thousands of dollars to be included on slate mailers sent out by private operators who may have no convictions about anything.[11] Thus, even if party endorsements are made in substantial part on the basis of political affiliations, those affiliations are likely to tell the voters more about a candidate's judicial philosophy than would the fact that he can afford to purchase a spot on one or more pseudo-official slates.

---

[10] In a primary election, both the partisan and the nonpartisan slots on slate are wide open. For some offices, the slate-mailer operator may choose candidates affiliated with his faction of the party; in other cases, the highest bidder may prevail. In the general election, the factors are different. The party's nominees for partisan office are included automatically and only endorsements of judges and other nonpartisan candidates, as well as endorsements of ballot measures are up for grabs. It is in fact the supporters or opponents of the latter who principally finance slate mailers. The official party organizations may also on occasion mail official slate mailers, but these mailers are only sporadic and generally are not distributed nearly as widely.

[11] Judge Alarcon's "frightened incumbent" may well not be willing to risk letting his opponent outbid him and secure the highly desirable spot on the pseudo-official slate mailer. Slate mailers are among the least expensive ways for an incumbent judge to let the voters know something about himself, not an easy task for an individual of whom the public is likely to have no prior awareness.

III

The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties. If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates.[12] They are even free, rightly or wrongly, to consider how the candidates may vote on important issues of public concern, such as abortion, capital punishment, affirmative action, gun control, and religious freedom, to name just a few. One would have to be exceedingly naive not to be aware that a judge's judicial philosophy may influence his or her votes on important public issues that come before the court, particularly the state or federal supreme court. Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process. While it is undoubtedly clear to all that California could not prohibit *all* endorsements in judicial elections, in this case it is equally clear that it cannot single out one form of disfavored speech and ban it.

Of course, the citizens of California have a choice. If they want their judges to be free from the need to conduct full-scale political campaigns, to solicit campaign funds, to seek endorsements from political organizations and private-interest pressure groups, and, most important of all, to be free from the need to worry about whether their decisions in pending cases will affect their chances

---

[12] That is clearly a factor normally considered by the appointing authority. More than ninety percent of all judges appointed by Democratic and Republic presidents in recent years were members of the same party as their benefactor. The same is generally true with appointments to the state courts by California governors.

of reelection, there are options available. California could, like the federal government, provide for the appointment of judges for life —at some or all levels of its judiciary. Or, there are other alternatives, some more in keeping with the traditional approach of most states. For example, California could provide that its judges must be elected or confirmed once, and that thereafter they would not need to stand for office again. However, it is not my function to tell California what system it should use to select its judges. There are legitimate arguments both for and against judicial elections; and various factors to be balanced—the most important being accountability, on the one hand, versus independence, on the other. In the end, however, any system must be judged in large measure by the quality of the judges it produces.

The system presently used in California has both advantages and disadvantages, as does the federal system. However, one thing is clear: Whatever California's ultimate decision, it may not call an election, judicial or nonjudicial, and silence citizens who wish to speak, individually or collectively, through a political party organization or otherwise.

RYMER, Circuit Judge, with whom ALARCON and FERNANDEZ, Circuit Judges, join, dissenting:

There is no question that political speech is at the core of the First Amendment, and is to be jealously protected. *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976). "Debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Id.* at 1, 96 S.Ct. at 612. Similarly, there is no question that all persons have the right to associate in political parties for the purpose of espousing their views. *Tashjian v. Republican Party*, 479 U.S. 208, 214, 107 S.Ct. 544, 548-49, 93 L.Ed.2d 514 (1986). Likewise the state's power to regulate the time, place and manner of elections does not extinguish the state's responsibility to be faithful to the First Amendment. *Id.* at 217, 107 S.Ct. at 550; *Eu*, 109 S.Ct. at 1019. I also agree that California's ban on political party endorsements, opposition and support of candidates for nonpartisan elections burdens First Amendment rights, and is

subject to strict scrutiny. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

However, I disagree that this case is like any other, including *Eu*, upon which the majority relies.[1] Article II, § 6(b) of the California Constitution, which was designed to keep party politics out of elections for these nonpartisan offices, must therefore be analyzed afresh.

The restriction on party endorsements in non-party elections goes to the heart of the structure of local, educational and judicial governance, which California has determined shall be nonpartisan in form. Cal. Const. art. II, § 6(a); Cal.Elec.Code § 37. No one contests the constitutionality of this structure. Implementing it, the Legislature has enacted a number of statutes that insulate nonpartisan elections from the party apparatus.[2] When the Cali-

---

[1] *Eu* had to do with whether the state could interfere with the internal processes of a party by preventing its governing body from endorsing, supporting or opposing a candidate for nomination to partisan offices in the party primary. It has nothing to do with the issue in this case, which concerns the nonpartisan structure of the judicial, municipal and educational units of government and the role of a partisan political party in nonpartisan elections for nonpartisan offices.

As Judge Norris wrote for our court in *Eu*, "[i]t is the right of the party, not the State, to decide how the party shall be governed." 826 F.2d 814, 827 (9th Cir.1987). The Supreme Court recognized the same point: "[a] primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them." 109 S.Ct. at 1022. Based on this principle it followed that the state may not enact laws " 'to prevent the parties from taking *internal* steps affecting their own process for the selection of candidates.' " *Id.* (quoting *Tashjian*, 479 U.S. at 224, 107 S.Ct. at 553-54) (emphasis added).

[2] For example, Cal.Elec.Code § 6401.5 provides that declarations of candidacy and other nomination papers for nonpartisan office may not refer to party affiliation; the name of the party to which a nonpartisan candidate belongs may not appear on the ballot (§ 10200.5); a voter may cast a ballot for a candidate for such an office without regard to party affiliation (§ 10214); and partisan and nonpartisan offices are listed in separate columns of the ballot (§ 10214). Political parties are also prohibited from nominating a candidate for a nonpartisan office (§ 36).

fornia Supreme Court ruled in 1984 that existing law did not clearly prevent political parties from endorsing and supporting candidates for nonpartisan office,[3] the people adopted a constitutional amendment to make clear their intent that no political party or party central committee should endorse, support or oppose a candidate for nonpartisan office.

The question in this case is whether California has a compelling interest in the structure of its nonpartisan government, such that prohibiting political party endorsements, opposition and support of candidates for nonpartisan office is the least restrictive means by which it can be achieved.[4] The answer, I submit, requires us to consider the unique nature of this interest in our federal system, and to constrain ourselves in the interests of comity to interpret § 6(b) so as to avoid unconstitutionality, if possible.

California's interest in this case is of extraordinary importance. It is rooted in the United States Constitution, which assures the citizens of each state the right to determine the structure of their

---

These provisions have the effect of creating a two-track process of candidate selection and election, paralleling the structural difference between nonpartisan and partisan offices.

For a comprehensive and detailed history of these statutes and the nonpartisan structure in California *see Unger v. Superior court,* 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238 (1984), and the original panel opinion by Judge Trott in *Geary v. Renne,* 880 F.2d 1062 (9th Cir. 1989).

[3] *Unger,* 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238.

[4] Although freedom to discuss matters of public concern is fundamental to our national heritage and the system of government ordained by our Constitution, the protection is not absolute and restraints are permitted for appropriate reasons. *See, e.g., Austin v. Michigan Chamber of Commerce,* ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (expenditure limitation); *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (contribution ceilings); *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (orderly elections); *Munro v. Socialist Workers Party,* 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *Jenness v. Fortson, 403* U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d (1971) (ballot access).

own government so long as it is in a republican form.[5] Because of its constitutional underpinning, the state's interest in this case is particularly compelling. Such an interest requires a different balancing of the burdens on plaintiffs' First and Fourteenth Amendment rights, the state's justification for the burdens imposed, and the restrictiveness of the means available to accomplish the goal of preserving the nonpartisan structure of government by keeping nonpartisan offices and nonpartisan elections, nonpartisan, than either the district court or the majority has undertaken.

It is not surprising that the state's interest in the structure of its government has not been taken into account, because the City argued a different interest (avoiding corruption) in its papers. Based on the argument that was made, the district court granted summary judgment. On one view this was consistent with *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), because the City produced no evidence to show that the state's interest are endangered by party participation in nonpartisan elections or that § 6(b) is the least restrictive means for serving its interests.[6] However, in light of the significance of this issue to the people of the State of California, and the overriding importance of the interest at stake, it is appropriate that the parties, and the court, have the benefit of a more searching analysis than has occurred in this case.

When, as here, both the record and the issues are inadequately developed, it is within the province of the district court to decline

---

[5] U.S. Const. art. IV, § 4.

[6] The government bears the burden of showing a subordinating interest that is compelling, and of proving that a regulation is a precisely drawn means of serving its interests. *Consolidated Edison Co. v. Public Serv. Comm'n* 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *San Francisco County Democratic Cent. Com. v. Eu,* 826 F.2d at 834. At the same time, the district court did not consider the "legislative findings" set forth in the California Ballot Pamphlet for the June 3, 1986 primary election (at which the voters enacted the amendment to Section 6) in determining that there were no triable issues of fact.

a summary judgment.[7] In this very special situation, I would reverse and remand to permit full consideration of the state interest I view as "super"-compelling.[8]

I

A

"A Republic, madam, if we can keep it" was Benjamin Franklin's response when asked what form of government the new Constitution created. A republican government is "a government which derives all its powers directly or indirectly from the great body of the people." The Federalist No. 39, at 112 (J. Madison)(R. Fairfield ed. 1981). It is "constructed on this principle, that the supreme Power resides in the body of the people." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457, 1 L.Ed. 440 (1793) (opinion of Wilson, J.). As put by the Court in *In re Duncan*, 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891), "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws."[9]

---

[7] *In re Ridgen*, 795 F.2d 727, 731-32 (9th Cir. 1986).

[8] The state's interest in the structure of its government is "super" compelling because of its constitutional significance. The guarantee clause commits the United States, including the courts of the United States, to protect the structure chosen by the citizens of each state. In this sense, structure is more compelling than corruption, for example, which is an evil that the state has a "compelling" interest in avoiding but which lacks the constitutional underpinnings of the state's form of government. Having recognized this, the state's interest in this case is to be weighed in accordance with accepted First Amendment jurisprudence.

[9] This power reposing in the citizens of each state is also basic to our federal system. "The federal Constitution forms a happy combination [between a large republic and a small one]; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." The Federalist No. 10, at 22 (J. Madison)(R. Fairfield ed. 1981). *See also, Oregon v. Mitchell*, 400 U.S. 112, 125, 91 S.Ct. 260, 265, 27 L.Ed.2d 272 (1970)(Black, J.)("[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices"); *FERC v. Mississippi*, 456 U.S. 742, 790 n. 28, 102 S.Ct. 2126, 2153 n. 28, 72 L.Ed.2d 532 (1982) (O'Conner, J., concurring in part and dissenting in part)(quoting I. Silone, The School for Dictators 119 (W. Weaver trans.): "[a] regime of freedom should receive its lifeblood from the self-government of local institutions. When democracy, driven by some of its baser tendencies, suppresses such autonomies, it is only devouring itself. . . . [i]f the central government's representative runs the city and the province, . . . you can no longer speak of democracy").

Article IV, § 4 of the United States Constitution declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." As described by one commentator, the guarantee clause

> restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents. . . . In order to ensure that state and local governments remain responsive to their constituents . . . citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery.

Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 *Colum.L.Rev.* 1, 41 (1988).[10]

California has chosen to make its judicial, educational and municipal offices nonpartisan. The guarantee clause requires that we "respect the state's most fundamental structural choices as to how its people are to participate in their own governance." L. Tribe, *American Constitutional Law* 398 (2d ed.1988). Put another way, the nonpartisan form of government represents a state interest of constitutional dimension. For that reason, it must be accorded weight of the most compelling sort.

---

[10] Merritt makes the further point that "the tenth amendment underscores the need to enforce the federalism principle found in the guarantee clause. The structure of the Constitution, which clearly contemplates a federal system, likewise affirms the importance of interpreting the guarantee clause as a restraint on federal power." *Id.* at 2 n. 8.

B

The district court recognized only a "legitimate" interest in maintaining the nonpartisan character of local, judicial, and school elections. Against that level of interest the court found that § 6(b) was "not a narrowly drafted enactment designed to advance such interest by the least drastic means."[11] Judge Zirpoli postulated that the state could safeguard its interests by providing for nonpartisan methods of nomination (which had already been done by statute), and by controlling partisan activities of the candidates, for example, by prohibiting candidates from soliciting or collecting campaign funds from political parties.

There are two problems with this analysis. It misapprehends the nature of the state's interest, and in so doing, undervalues it. Second, it hypothesizes less restrictive means without considering their relationship to the interest at stake or whether they work.[12]

The interest at stake is California's choice of a nonpartisan structure of government for judicial, school and municipal office. I believe it is "super"-compelling. In determining whether the limitations embodied in § 6(b) sufficiently relate to that interest and are narrowly tailored to serve it, we may look to precedent,[13] determine that the answer is "inherently persuasive" or "self-

[11] *Geary v. Renne,* No. CV-87-4724, at 4 (Order filed April 27, 1987).

[12] "It is not helpful to ponder what is 'less restrictive' without thinking about the functions the rules serve and how these functions would be affected by 'less restrictive alternatives.' *Every* alternative is more restrictive than some other one." *Stevenson v. State Bd. of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) (Easterbrook, J., concurring) (emphasis in original).

[13] *See, e.g., Buckley,* 424 U.S. at 17-19, 96 S.Ct. at 633-35; *Bellotti,* 435 U.S. at 790, 98 S.Ct. at 1424; *FEC v. National Right to Work Comm.,* 459 U.S. 197, 205-07, 103 S.Ct. 552, 558-59, 74 L.Ed.2d 364 (1982); *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (no precedent on point).

evident,"[14] or base a decision on legislative findings or record evidence.[15]

The majority looks to precedent and finds *Eu v. San Francisco Democratic Cent. Comm.* persuasive. However, it is not possible to fit this case into that pigeonhole. *Eu* involved different issues and a different interest.

Eu had to do with the system by which a political party selects its own candidates for partisan office. The purpose of a primary election within this structure is to settle the differences within the party, so that the majority views of the party members are carried forward to the general election. The partisan primary election is designed to ensure that party nominations are within party lines, thus preserving the integrity of the party. In *Eu* we found that regulation of internal party affairs burdens the right of political parties to govern themselves as they see fit, because a partisan primary is by definition theirs.

By the same token, a nonpartisan election is by definition *not* theirs. The purpose of an election within the nonpartisan structure

[14] *See, e.g., Bellotti,* 435 U.S. at 790, 793, 98 S.Ct. at 1424, 1425.

[15] *Compare Bellotti,* 435 U.S. 765, 98 S.Ct. 1407 (without showing that relative voice of corporation has been overwhelming or even significant in influencing referenda, or that there has been any threat to the confidence of the citizenry in government, argument that participation would exert undue influence is not persuasive) and *Eu,* 109 S.Ct. at 1019 (state had failed to submit " 'a shred of evidence' " that regulations of party internal affairs helped minimize party factionalism) (quoting Ninth Circuit opinion, 826 F.2d at 833, in turn quoting Civ. No. C-83-5599 (N.D. Cal. May 3, 1984) *with Jenness,* 403 U.S. 431, 91 S.Ct. 1970); *American Party of Texas v. White,* 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974); *Storer v. Brown,* 415 U.S. at 736, 94 S.Ct. at 1282; *Munro v. Socialist Workers Party,* 479 U.S. at 194-95, 107 S.Ct. at 537-38 (states are not required to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to imposition of reasonable restrictions on ballot access; otherwise, state's political system would have to sustain some level of damage before legislature could take corrective action).

has nothing to do with settling the internal divisions within a political party. Rather, a nonpartisan structure abandons the political party as a conduit for the electorate's views. Nonpartisanship envisions "direct representation of citizens rather than indirect representation through parties as intermediaries." Note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 *Colum.L.Rev.* 1677, 1679 (1987).

The interest asserted by the state was quite different as well: protecting political parties from disruption that might result if they were to make preprimary endorsements. "This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest for a State has a legitimate interest 'in orderly elections, not orderly parties.' " *Eu*, 109 S.Ct. at 1019 (quoting our opinion, 826 F.2d at 831).

The district court, on the other hand, recognized that *Eu* was not dispositive[16] but it proceeded by way of assumption, and was also apparently of the view that the issue was self-evident because it granted summary judgment without a record. Much as I respect Judge Zirpoli, I do not think the result in this case is self-evident. If, however, my only option were to decide what *is* self-evident, I would say that nonpartisan means no party and there is accordingly no less restrictive means of filling a no-party office, than a no party election. But I believe reasonable judges can reasonably differ on a sensitive issue such as this. It is therefore unsatisfactory that we should indulge our own instincts or experience.

There is a framework within which an objective analysis could be conducted that would be commensurate with the importance of this case. A logical starting point is how the Legislature has filled out the skeleton of the state's nonpartisan structure for judicial, school and municipal government. A "partisan office" means "an office for which a party may nominate a candidate," while a nonpartisan office is one whose holders have not been nominated in a partisan primary or identified on the ballot as affiliated with a political party, and who have not been elected on

[16] Order Denying Defendants' Motion to Vacate Judgement, Civ. No. C-87—4724 (N.D.Cal. June 9, 1988), 1-2.

a partisan ballot.[17] In 1986 the people of the state amended Section 6 of the California constitution to reaffirm that "[a]ll judicial, school, county, and city offices shall be nonpartisan" (§ 6(a)) and to provide that "[n]o political party[18] or party central committee may endorse, support, or oppose a candidate for nonpartisan office" (§ 6(b)).[19] This was done to continue a "long-understood ban on partisan electioneering in local and

[17] *See* n. 2, *supra*. These statutes could be taken to define what a "nonpartisan" election means. On the other hand, they could reasonably be characterized as merely the procedures for a nonpartisan election that the state has chosen so far. As such they would neither be definitive, nor indicative of how much baggage a nonpartisan election can carry and still be nonpartisan. There is no basis in the record in this case to make this kind of determination, one way or the other.

[18] Because "political party" is elsewhere defined to refer to ballot-qualified organizations, the parties affected are the Democratic Party (Cal.Elec.Code §§ 8500-8945), the Republican Party (§§ 9000-9510), the American Independent Party (§§ 9600-9745), and the Peace and Freedom Party (§§ 9750-9855).

[19] While it is irrelevant for constitutional purposes that the voters rather than a legislative body enacted § 6(b), *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981), in this particular case it is not without significance that the decision to limit party endorsements in nonpartisan elections was made by the very people who are the members and the constituents of the parties whose speech was limited. Members of the state central committees are indirectly elected by the people. *See* Cal.Elec.Code 8660. Thus § 6(b) was not the product of a representative body acting out of paternalistic or preservationist instincts, but of the people themselves, hardening their own instrumentalities. *See Bellotti*, 435 U.S. at 791 n. 31 98 S.Ct. at 1424 n. 31 ("[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves"); *cf. Buckley*, 424 U.S. at 93-97, 96 S.Ct. at 670-72 (state may not "unnecessarily burden either a minority party's or an individual candidate's . . . interest in the continued availability of political opportunity") (citations omitted); *American Party of Texas v. White*, 415 U.S. at 780-81, 94 S.Ct. at 1305-06 (state must afford minority political parties a real and essentially equal opportunity for ballot qualification).

judicial elections"[20] which the California Supreme Court had concluded was not enforceable under the Constitution or statutes as then drafted.

Next, it makes sense to assess the burden § 6(b) imposes on political parties.[21] It does not prevent individuals or groups of

---

[20] Argument in Favor of Proposition 49 (to amend Section 6), California Ballot Pamphlet, Primary Election, June 3, 1986, p. 26. *See* Lee, *The Politics of Nonpartisanship* 102-104 (1960), and discussion in *Unger*, 37 Cal.3d at 616, 209 Cal.Rptr. 474, 692 P.2d 238.

According to Lee's survey, there was "public or openly visible activity" on the part of county committees, local political clubs, party officials or representatives in local city, county or school elections in only 25% of the counties surveyed. *Lee* at 102-103, Table 32. Whether there was any involvement in judicial elections even in those counties is unclear.

Regardless, it is incorrect to infer from Lee, as the majority appears to do, that political parties *endorsed* candidates for nonpartisan office in 25% of the counties prior to 1986. Majority opn., *supra*, at 282 ("Nevertheless, because the legal status of such endorsements was unclear, political parties did not endorse candidates in 75% of California counties"). Table 32, from which that statistic is drawn, concerns "public or openly visible activity," not endorsements. Table 33, which shows the type of political activity reported on the survey, indicates that public endorsement of candidates occurred in 4 counties (about 10%)—although there is no way of telling from the survey whether the occurrence was singular, sporadic or repetitive.

Referring to the Lee survey, or relying on it to suppose that party endorsements caused no harm to the nonpartisan structure before § 6(b) was adopted in 1986, illustrates why it is risky to make decisions based on assumptions without an evidentiary basis. While Lee is no doubt an able scholar, neither the methodology nor significance of the results he reports has been tested by cross-examination.

[21] When deciding whether laws that impinge on associational freedoms violate the First Amendment:

> [A] court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State, as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests: it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Tashjian, 479 U.S. at 214, 107 S.Ct. at 548-49 (quoting *Andersen v. Celebrezze*, 460 U.S. at 789, 103 S.Ct. at 1573). While the restrictions embodied in § 6(b) implicate both First and Fourteenth Amendment rights, *Eu*, 109 S.Ct. at 1020, the magnitude of the injury has to be measured against both the strength of the interest, and the alternatives available. The district court did not touch these bases because of its assumption that the state's interest was corruption and that alternative means would be less restrictive.

individuals (such as the California Democratic Council or "Democrats for Bradley") from making endorsements. Nor does it preclude political parties from speaking out on issues. For example, the Republican Party could support the building of a jail in Fresno and the Democratic Party could oppose it, even though candidate A for mayor was for the building of the jail and candidate B was against it. Narrowly construed, § 6(b) does not inhibit a political party from calling attention to a candidate's record and experience and qualifications. Further, the identification of candidates with particular parties plays much less of a role in the nurturing of an informed electorate for local, school and judicial offices, than for national (or state) elections.[22] To the extent that the natural focus of a ballot-qualified party is on issues of broad application and on partisan offices such as the Presi-

---

[22] States have a greater interest in regulating statewide or local elections than national elections. *Anderson*, 460 U.S. at 795, 103 S.Ct. at 1573. Indeed, one purpose of nonpartisan elections is to insulate state and local elections from the national issues that are the natural focus of national political parties. *See* note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 *Colum.L.Rev.* at 1679-81.

It is no answer to suggest, as did the dissent in the original panel opinion, that "[t]here may be no Republican, or Democratic, or Libertarian way to build a city jail but there may very well be Republican, Democratic or Libertarian positions on whether a jail should be built and who should be taxed for it." 880 F.2d at 1084. There is nothing about § 6(b) which would impede the Republican Party, or the Democratic Party, or the Libertarian Party, or the Peace and Freedom Party from expressing their views on such matters.

dency, the Congress, or the Governorship, party labels provide scarcely any "shorthand designation of the views of party candidates on matters of public concern" in connection with nonpartisan, specialized local elections.[23] This is especially so since candidates for nonpartisan office neither run as a party member, nor are labelled as such on the ballot.[24]

These factors should then be considered in light of the "super"-compelling importance of the state's interest in its chosen form of government, to determine if § 6(b) is narrowly tailored, whether there are less restrictive means that serve that interest, and whether alternatives work. The majority concludes that "the mere fact that § 6(b) targets the collective rather than the individual voices of party members does not suffice to render it 'precisely drawn.' "[25] I agree.[26] But the fact that it targets the collective voice only with respect to endorsements for nonpartisan offices may render it drawn as precisely as it can be,[27] for to preclude party endorsements in nonparty elections is the flip side of a candidate's running for nonpartisan office without party identification. It also conforms exactly to the California Election Code's definition of partisan office as one "for which a party may

---

[23] *See Tashjian*, 479 U.S. at 220, 107 S.Ct. at 551-52 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise").

[24] Indeed Lee's survey includes an appraisal which shows that party activity helped in six cities where both Republican and Democrats were active, and made no difference in three; when only Democrats were active, it helped in two, made no difference in one, and hurt in two. Lee, *The Politics of Nonpartisanship* 104 (Table 34).

[25] Majority opn., *supra*, at 284-285.

[26] As *Bellotti* says, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777, 98 S.Ct. at 1416.

[27] The ban on support and opposition is more problematic. *See* discussion, *infra* at 304-305, and n. 40.

nominate a candidate."[28] and conversely to that of a nonpartisan office, for which a party may not nominate a candidate.

The "less drastic" possibilities posited by the district court (and adopted by the majority) may be links in the chain, but cannot serve the state's structural interest if there is any missing link. For example, Judge Zirpoli suggested that nonpartisan methods of nomination would be less restrictive. Clearly these serve the applicable interest. However, if nonpartisan methods of nomination were not supplemented by prohibiting party endorsements, the track to nonpartisan office would be virtually indistinguishable from the track to partisan office. Candidates are nominated for nonpartisan office by petition which may not disclose their party affiliation; those for partisan offices are nominated through partisan primaries. There would thus be no material difference between a nonpartisan method of *nomination*, with party endorsements as Judge Zirpoli suggests, and a partisan method of *election*.[29] Therefore it does not appear that the means of relying entirely on nonpartisan nomination methods, without the limitation in § 6(b), would work.[30] The district court's other suggestion,

---

[28] Cal.Elec.Code § 36.

[29] In other words, if Diane Feinstein, John Van de Kamp, and Pete Wilson were running for mayor, and if the Democratic Party endorsed Van de Kamp and the Republican Party endorsed Wilson, for all practical purposes the process would parallel the partisan track. The only difference would be that in the case of the nonpartisan track, the decision about which candidate would carry the party banner would be made by the party, not by the people as is their prerogative in the partisan track. The irony is, this would allow political parties even greater power in the nonpartisan track than in the partisan. That not only runs counter to what the voters intended when they amended Section 6 of the California Constitution, but would effectively destroy the nonpartisan system—and *that* runs counter to the intent of Article IV, § 4 of the United States Constitution.

[30] That certainly was the judgment of supporters of the amendment to Section 6. *See, e.g.*, an editorial in *The Sacramento Bee*, To Protect Non-Partisan Elections, which opined that "[t]he principal danger is that the decision [*Unger*] opens the way . . . to school boards whose members make curricular decisions according to the political orientation

prohibiting candidates from soliciting or collecting campaign funds from political parties, might serve the state's interest in corruption, but would only incidentally advance its interest in structure.[31]

Because the district court was considering corruption, it measured neither alternative against a structural interest that is "super"-compelling. While these or other means might work, there is no basis in the record for reaching a reasoned conclusion that they will or won't.

Instead, the final step in the analysis ought to be whether the state's interest in the nonpartisan structure of government, constitutionally recognized in the guarantee clause, warrants a burden of the sort imposed on the First and Fourteenth Amendment rights of a political party. Both the Congress and the Supreme Court have acknowledged that there is a difference of constitutional dimension between political activity by political parties and political activities of other organizations or individual political actors. In *Civil Serv. Comm'n v. Letter Carriers,* 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973), the Supreme

---

of the parties that support them and, worse, look toward advancement by the party as a reward for faithful service in 'non-partisan' positions. August 13, 1985, at B6, col.1 (final ed.) (editorial), *quoted in* 87 *Colum.L.Rev.* at 1681. *See also* California Ballot Pamphlet, p. 26 ("To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 [to amend Section 6] is absolutely necessary.").

[31] A Columbia Law Review Note proposes other means which the author suggests are also less restrictive: one would be to increase party competition, thereby rendering candidates less vulnerable to manipulation because they would have alternative means of support; another, to appoint administrative local officials rather than elect them. 87 *Colum.L.Rev.* at 1698-99. The former relates primarily to the state's interest in corruption but would turn its interest in structure on its head; the latter would too, in that presumably those administrative personnel would be appointed by persons elected in partisan elections. Neither means comports with a nonpartisan structure, and that is a choice both the guarantee clause and the Tenth Amendment leave for the people to make.

Court upheld the Hatch Act, which prohibited federal employees from involvement in political activity, against a First Amendment challenge. In so doing, it emphasized the right of government employees to be involved with everything except political parties.

Conversely there is nothing about the state's interest in the nonpartisan form of its local, school and judicial government that implicates the rights of anyone but a ballot-qualified political party from endorsing, opposing or supporting candidates for nonpartisan office. The same goes for the rights of a political party to espouse views on controversial issues, even when those views correspond to views held by a particular candidate.[32]

It was clear to the Court in *Letter Carriers* that the danger to proper government functioning presented by political party involvement was different in kind from the danger presented by the involvement of other organizations, ideas, considerations, or even by political actors of an independent stripe. In other words, in the

---

[32] The state could not, for example, justify a ban on endorsements by special interest groups on the ground that government should be "non-special interest." The state's interest in the structure of government goes to such things as whether it is to be partisan or nonpartisan, town meeting or city council, appointive or elective; the state could not rely on an interest stemming from the guarantee clause to justify a government based on religious beliefs or race or ideas. Such things have nothing to do with structure.

By the same token, if the state's asserted interest is *corruption,* its justification for banning endorsements by political parties is weakened because the corrupting effect of endorsements or support by a special interest group may be essentially the same. However, clout of a special interest group has no relevance to the state's interest in the *structure of government.* Special interest groups have no access to the ballot and their membership may cut across party lines. Their raison d'etre is to influence voters and officeholders issue by issue, sometimes in accord with the views of a political party, sometimes not. They are quintessentially non-party organizations. By contrast, political parties have ballot access, are comprised of persons of the same political persuasion, and exist to win elections and run governments. *See Moore v. Panish,* 32 Cal.3d 535, 186 Cal.Rptr. 475, 652 P.2d 32 (1982). They are quintessentially the opposite of non-party or nonpartisan.

political context nonpartisanship does not mean that an office-holder adheres to no causes or factions, or even that the office holder is not committed to the tenets or goals of a political party. It does mean that there should not be activity that gives (or seems to give) a party any power whatever over the holder of a nonpartisan office.

Accordingly, there is no reason inhering in the state's interest in the structure of its government that inhibits California from justifying its restriction on endorsements in this case.

II

Because the state's interest in the structure of nonpartisan government is so compelling, I do not believe it is necessary to reach the corruption issue. The majority does, but its approach is flawed in a way that affects its analysis of the state's justification for § 6(b). The majority focuses solely on financial corruption of the sort addressed in *Buckley, FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985), and *Austin v. Michigan Chamber of Commerce*, ___ U.S. ___, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and purports to distinguish the kind of corruption "decried" by California in this case.[33] However it is clear that corruption can occur from *political* as well as financial debt. *See, e.g., Letter Carriers*, 413 U.S. at 565, 93 S.Ct. at 2890 (partisan political activities by government employees poses danger to "fair and effective government"); *Bellotti*, 435 U.S. at 788 n. 26, 98 S.Ct. at 1422 n. 26 (importance of government interest in preventing corruption of elected representatives through creation of political debts "has never been doubted"); *Buckley*, 424 U.S. at 26-27, 96 S.Ct. at 638. *Letter Carriers* is closely on point, implicitly recognizing that partisan politics may have a corrupting influence on a system designed to be nonpartisan.[34] The interest California

[33] Majority opn., *supra*, at 283.

[34] The Hatch Act does not prohibit political activity in connection with nonpartisan elections or with questions "not specifically identified with a National or State political party." 5 U.S.C. § 7326. Thus, it specifically addresses the corrupting influence that political party organizations have on the administration of the law in a nonpartisan context.

actually asserted in this case is not that endorsement by a political party corrupts the voter by influencing him or her to cast a ballot one way or the other;[35] rather, it is that endorsement corrupts the nonpartisan candidate and officeholder in the performance of his duties.[36] Along with the state's interest in preventing corruption of

[35] That would be indefensible. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407; J. Ely, *Democracy and Distrust* 111 (1980) (state cannot regulate political speech because of "a fear of how people will react to what the speaker is saying"). It would also be inconsistent with the intent of the people when they adopted § 6(b). For example, the proponents argued:

> To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN—NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?
>
> WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN—NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW—BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?
>
> Californians do not want their judges to become beholden to political parties.
>
> UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.
>
> Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.
>
> Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

California Ballot Pamphlet at 26.

[36] Everyone knows, for example, that Mayor Bradley is a Democrat. That knowledge—or the communication of information that the Democratic Party or some group identifying itself with Democratic causes

that sort, "[p]reservation of the individual citizen's confidence in government is equally important." *Bellotti*, 435 U.S. at 789, 98 S.Ct. at 1422.

Even if a limitation on speech does keep information from the voters, *Buckley* teaches that it is permissible if there is a compelling state interest balanced against a marginal burden on First Amendment rights. Applying *Buckley* to § 6(b) suggests that endorsements are more analogous to large campaign contributions than to independent expenditures; unlike independent campaign expenditures, endorsements are prearranged and coordinated.[37] Unlike a contribution, however, endorsement itself creates the corruption, not the *amount* of endorsement. The state therefore has a justification for banning endorsements that neither the district court nor the majority recognizes.

The majority also relies on *Austin* in concluding that the kind of corruption at issue here is different from that reached elsewhere. While the relevance of *Austin* to this case is by no means clear, it is not unambiguous. However tempting it may be to whitewash its holding or pick and choose what it says, the Court can fairly be read to suggest that the state's interest in avoiding corruption is reasonably furthered by restricting speech, in the form of expenditures, by organizations which have amassed political "war chests" with the aid of legal advantages conferred by the state. As ballot-qualified parties have that status by virtue of

favors his election as Mayor—would not likely spoil anyone but the candidate. As the Mayor's brief in this case points out, the problem is not "the impact that endorsements may have on voters' choices but rather [their] indirect impact on elected officials' independence from partisan political pressures."

[37] Declaration of Richard Mountjoy, E.R. 72. (Although I have some concern about citing the Mountjoy Declaration because it arguably was not part of the summary judgment record, it was apparently reviewed in connection with the motion to vacate. In any event what he says is a matter of common sense: it is unlikely that a party endorsement would appear on the ballot information pamphlet unless the candidate had agreed to it.) Opposing or supporting a candidate, on the other hand, is closer to a restriction on independent expenditures, which *Buckley* declined to approve.

statute in California, it could be said that they, too, have amassed their clout with the aid of legal advantages conferred by the state such that, in the context of a nonpartisan election, their "war chest" would have a correspondingly corrosive effect.[38]

III

We have an obligation to construe any law, if fairly possible, to avoid raising doubts of its constitutionality. *New York v. Ferber*, 458 U.S. 747, 769-70, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982); *Letter Carriers*, 413 U.S. at 571, 93 S.Ct. at 2892. However, neither the district court nor the majority tries to do so.

The issue in this case is whether the City of San Francisco erred in not permitting party endorsements to appear on the official San Francisco Voter Pamphlet, in reliance on § 6(b). It is not necessary to construe § 6(b) as the majority does, as "impos[ing] a total ban on any partisan gesture of support for or opposition to a candidate."[39]

Not even plaintiffs assert that the ban encompasses "any partisan gesture of support.'" Plainly it does not: parties are free to speak out on issues and relate those issues to a candidate; partisan sub-groups are free to do anything they want in as partisan a way as they choose.

More significantly, § 6(b) can be construed to prohibit only endorsements, and not to extend to communications about the candidates' qualifications, position on the issues, experience or platform. It can also be construed as applying only to public endorsements, or endorsements on the official voter information

[38] *See also California Medical Ass'n v. FEC*, 453 U.S. 182, 201, 101 S.Ct. 2712, 2724, 69 L.Ed.2d 567 (1981). In upholding limitations on union and corporate campaign activity, the Supreme Court states that the "differing structures and purposes" of entities "may require different forms of regulation in order to protect the integrity of the electoral process." The Court further distinguished restrictions placed on individuals and unincorporated associations, on the one hand, and unions and corporations on the other.

[39] Majority opn., *supra*, at 285.

pamphlet. In any event it could be construed not to apply to recommendations made to members. *See, e.g., United States v. CIO,* 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (declining to construe § 313 of the Corrupt Practices Act to prohibit corporations and unions from expressing views on candidates directly to members). To the extent § 6(b) provides that a political party may not "support or oppose" a candidate for nonpartisan office, it may be too vague or too encompassing to be enforced. If excision of those terms will narrow the statute so that it can be constitutional, the necessary surgery should be performed.[40] *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985).

IV

It is particularly troubling in this case that there is virtually no record.[41] There is, for example, no evidence showing whether the relative voice of political parties has been unduly significant or influential in nonpartisan elections where endorsements have

---

[40] To eliminate the ban on opposition and support would also decrease the appearance of prearrangement and coordination that *Buckley* found to be indicators of corruption. To the same extent, the risk of a direct quid pro quo is lessened. Limiting § 6(b) to endorsements would also obviate the problem of how to enforce a restraint on "opposing" or "supporting" on the margin, for instance, whether Republican Party opposition to Mayor Bradley's campaign for Governor (a partisan office) would violate its obligation not to "oppose" him in his capacity as a candidate for, or officeholder of, the mayoralty (a nonpartisan office).

[41] The case comes to us in a curious posture. Relating to the issues presented in this case and in connection with the motion for summary judgment, the plaintiffs produced the affidavits of Arlo Hale Smith and Terence Falkner. These declarations went to standing, not to substantive issues. The city presented no evidence in opposition. Subsequently, the City submitted several declarations in connection with its motion to vacate, as did plaintiffs in opposition. In denying the motion to vacate, the district judge indicated that he had reviewed the motion but was not persuaded to change his decision. In that sense, the declarations are a part of the record. However, it is unclear that they form any part of the basis of the district's order granting partial summary judgment.

occurred. Nor is there any evidence bearing on feasibility of alternate means to aid the state's interest. The absence of a record leads inexorably to judges judging on their own instinct or experience.

This case presents an issue of fundamental importance to the State of California, and concerns an interest of the people that lies within the heartland of the Constitution. That being so, we should not conclude that California's concern is not compelling enough, without searching inquiry and an adequate record.

I would, therefore, reverse and remand.[42]

ALARCON, Circuit Judge, dissenting:

I respectfully dissent from the majority's opinion. I concur in Judge Rymer's conclusion that the State of California has a compelling interest in maintaining the nonpartisan structure of local, judicial, and school elections that is protected by the guarantee clause. I write separately because it is my view that the district court and the majority have failed to consider properly the evidence in the record and the lessons of California's history regarding the devastating impact that party endorsement can have on the integrity of local office holders and on the independence of its judiciary.[1]

California judges, unlike the members of this court, are not appointed for life. California trial judges must run for reelection every six years against any opponent who has practiced law for the minimum number of years and has not been convicted of a crime. Cal. Const. art. VI, § 16(b), (c) (West Supp.1990). Its appellate judges must run on their record in an uncontested election every

---

[42] *See Mandel v. Bradley,* 432 U.S. 173, 177-78, 97 S.Ct. 2238, 2241, 53 L.Ed.2d 199 (1977) (remanded "to permit further findings with respect to the extent of the burden imposed" by state electoral regulations).

[1] I agree with Judge Reinhardt that an endorsement by a political party in a non-partisan election is less evil and corrupting than "massive political contributions." *Ante at* 287. The question whether California can constitutionally slay that dragon, however, is not before us in this matter.

12 years. *Id.* § 16(a), (d). By adopting subsection (b) of article II, section 6 of its constitution, California has wisely chosen to prevent political parties from imposing on candidates for judicial office "litmus tests" of their views on contemporary social and political issues as the price of a partisan endorsement.

California adopted nonpartisan elections to end political control of local, school, and judicial offices by greedy and unscrupulous party officials and morally corrupt public officeholders. The majority's holding will dismantle the structure erected by California citizens to provide them with local officials who have not compromised their views or made improper commitments to gain party endorsement and win an election.

I

CALIFORNIA'S POLITICAL PAST: A CORRUPT BEGINNING

The philosopher, George Santayana, warned us that "[t]hose who cannot remember the past are condemned to repeat it." G. Santayana, 1 *The Life of Reason* 2284 (1905). The voters adopted subsection (b) on June 3, 1986 because they wanted to avoid a repetition of the pervasive corruption of public officials that existed in California prior to the political reformation that began in 1911 under the leadership of Hiram Johnson.

In the latter part of the nineteenth century, the founders of the Southern Pacific Railroad, Collis P. Huntington, Leland Stanford, Charles Crocker, and Mark Hopkins, known as the "Big Four," dominated California politics. *California Politics and Policies* 4 (E. Dvorin & A. Misner eds. 1966) [hereinafter *California Politics*]. "[T]here was hardly an office, from the seats in the United States Senate down through the governorship and the courts to the most inconsiderable town office, in which the right man could not do the railroad a service." J. Caughey & N. Hundley, *California: History of a Remarkable State* 281 (4th ed. 1982) [hereinafter J. Caughey]. Illustrative of the arrogant confidence of the "Big Four" regarding its political dominance is the threat made by Charles Crocker to the Los Angeles City Council: "If this be the spirit with which Los Angeles proposes to

deal with the railroad upon which the town's very vitality must depend I will make grass grow in the streets of your city." *California Politics, supra*, at 4.

Wholesale civic corruption in San Francisco led to political reform of California's local elections. In 1901, attorney Abraham Ruef, the leader of the Union Labor Party, was successful in capturing the mayor's office for his candidate, Eugene E. Schmitz, a theatre musician. In 1905, Ruef was successful in bringing about the election of his full slate of supervisors. J. Caughey, *supra*, at 282. In addition, Ruef controlled the police force and the city's franchise board and "used utility rates as a means of political payoff." J. Owens, E. Costantini & L. Weschler, *California Politics and Parties* 33 (1970). "Ruef's machine exacted tribute from saloons, gambling houses, bordellos, French restaurants, prize fights, and the like, but its more ambitious levies were upon telephone, gas, water, and streetcar companies." J. Caughey, *supra*, at 282.

After the 1906 earthquake, the Ruef machine found "even greater opportunities" for graft. *Id.* at 283. The people of San Francisco were, as now, enchanted with their cable cars. They did not want any overhead trolleys to spoil the beauty of their city. Shortly after the earthquake, however, the Ruef machine, making use of allegations that tremors had closed the cable slots, succeeded in granting the United Railroads Company a blanket franchise to install trolley lines. *Id.*

The Ruef machine's political exploitation of the devastation caused by the earthquake resulted in a mass meeting called to denounce corruption in San Francisco. *Id.* Thereafter, District Attorney William H. Langdon announced that charges of graft and malfeasance in office would be presented to the grand jury. *Id.* The mayor's response to this announcement was to attempt to remove the district attorney from office and replace him with Ruef. *Id.* Langdon, however, obtained an injunction to prevent Ruef from taking over the prosecutor's office. *Id.*

During the grand jury investigation 17 out of 18 supervisors testified that they had taken bribes. *Id.* at 284. The grand jury returned 70 indictments against Ruef. *Id.* at 283-84. During one

of the trials against Ruef, Francis J. Heney, the chief prosecutor, was shot down in open court by a juror. *Id.* at 284. His assailant was found dead in his cell. *Id.* Hiram W. Johnson, a successful San Francisco attorney, volunteered to step in and take over the prosecution of Ruef. *Id.* Ruef was convicted and sentenced to 14 years in prison. *Id.*

Meanwhile, appalled by the manipulation of the 1906 Republican State Convention by the Southern Pacific Railroad's political henchmen, newspaper editors and publishers advocated the adoption of a direct primary system in California to permit the membership of each party to have a voice in the selection of its candidates. *California Politics, supra,* at 24-25. In the 1908 election, an overwhelming majority of voters voted to adopt an amendment to the California Constitution to institute a direct primary system. B. Hyink, S. Brown, & E. Thacker, *Politics and Government in California* 25 (10th ed. 1979) [hereinafter B. Hyink].

Hiram W. Johnson was nominated as a reform candidate for governor in the 1910 Republican primary. Johnson promised to "kick the Southern Pacific Railroad out of the Republican Party and out of state government." J. Caughey, *supra,* at 288. Johnson won the Republican nomination by defeating four candidates, including a candidate endorsed by the railroad. B. Hyink, *supra,* at 25. In 1911, Governor Hiram Johnson embarked on a program of legislative reform that included statutes that, by 1913, succeeded in effectively barring political parties from participation in the nomination process for nonpartisan candidates. *See Unger v. Superior Court,* 37 Cal.3d 612, 617, 692 P.2d 238, 241, 209 Cal.Rptr. 474, 477 (1984) (*Unger II*). The reform of California politics begun under Governor Johnson in 1911, including the elimination of judicial and local offices from party control, was described by Theodore Roosevelt as "the most comprehensive program of constructive legislation ever passed at a single session of an American legislature." J. Caughey, *supra,* at 289. The language of article II, section 6(a) of the California Constitution, adopted in 1972, is the embodiment of Governor Johnson's reforms. It provides: "Judicial, school, county, and city offices shall be nonpartisan." Cal. Const. art. II, § 6(a).

II

ENDORSEMENTS IN NONPARTISAN ELECTIONS EXPRESSLY EXCLUDED

Sixty-eight years after Johnson began his crusade of political reform, the Marin County Democratic Central Committee attempted to involve itself in a nonpartisan election. On or about September 1, 1979, the Marin County Democratic Central Committee "invited all registered Democrats who were candidates for the governing board of the district to attend a September 6, 1979, meeting of the County Central Committee *to seek the endorsement* of the County Central Committee and *to apply for financial assistance.*" *Unger v. Superior Court,* 102 Cal.App.3d 681, 683, 162 Cal.Rptr. 611, 612 (1980) (*Unger I*) (emphasis added), *cert. denied,* 449 U.S. 1131, 101 S.Ct. 952, 67 L.Ed.2d 118 (1981). The Marin County Democratic Committee publicly endorsed four candidates. *Id.,* 162 Cal.Rptr. at 612.

Samuel Unger, a candidate for election as a member of the governing board of the Marin County Community College District, did not attend the meeting or seek endorsement. Instead, he filed a petition in the Superior Court of Marin County, seeking to enjoin the County Central Committee from endorsing or supporting candidates for nonpartisan office. *Id.* Unger argued that the County Central Committee's endorsement violated article II, section 6 of the California Constitution and section 37 of the Elections Code. Section 37 provides: " 'Nonpartisan office' means an office for which no party may nominate a candidate. Judicial, school, county and municipal offices are nonpartisan offices." The Superior Court of Marin County denied the petition without leave to amend and ordered the action dismissed. *Id.* at 684, 162 Cal.Rptr. at 612.

The California Court of Appeal for the First District, Division Two, concluded in *Unger I* that,

> the explicit and unqualified language of Article II, section 6 prohibits a political party and, in particular, a county central committee of a political party, from endorsing, supporting, or opposing a candidate for the office of governing members of the board of a community college district, a nonpartisan school

office within the meaning of the constitutional provision, in any election.

Id. at 686, 162 Cal.Rptr. at 613-14. On May 22, 1980, the California Supreme Court denied an application for a hearing of *Unger I.* Justices Stanley Mosk and Frank Newman voted to grant the application.

On March 9, 1982, Samuel Unger and others filed a petition in the Superior Court of San Francisco seeking to restrain the Republican Party of California from recommending a negative vote in a retention election regarding three justices of the California Supreme Court. Only three of the seven members of the California Supreme Court sat on this matter. Four retired members of the Californa Courts of Appeal[2] were assigned to hear this appeal. Justice Mosk, joined by Justice Files and Justice Janes, concluded that article II, section 6 did not prohibit a political party from endorsing, supporting, or opposing candidates for a nonpartisan office. *Unger II,* 37 Cal.3d at 620, 692 P.2d at 243, 209 Cal.Rptr. at 479. Justice Mosk, however, did not purport to discuss the propriety or wisdom of a law that would bar endorsements on nonpartisan elections: "Our conclusion in this case is reached without consideration of policy questions. *We are not unmindful of the persuasive reasons why it is preferable for political parties to refrain from endorsing or opposing nonpartisan candidates.* However, that is a matter for consideration by the Legislature; it, not the judiciary, is the proper body to impose regulations in the conduct of political parties." *Id.,* 692 P.2d at 243-44, 209 Cal.Rptr. at 479-80 (emphasis added).

Justice Malcolm Lucas filed a concurring opinion in which he stated as follows:

> I concur, albeit reluctantly, in the majority opinion. My agreement stems from my conclusion that Justice Mosk has correctly interpreted the scope of the existing restrictions im-

[2] The four assigned justices were retired Presiding Justice Gordon L. Files, retired Associate Justice Bertram D. Janes, retired Associated Justice Richard M. Sims, Jr., and retired Associate Justice Rodney K. Potter.

posed by the Legislature and the California Constitution. My reluctance flows from my concern about the effect of our ruling in light of important social and political policy considerations expressed by Justice Sims in his dissent. *I think there is a strong state interest in preserving the nonpartisan nature of the offices involved and that this interest will be sorely tried if political parties engage in wholesale endorsement of and opposition to candidates for "judicial, school, county, and city offices . . . ."* (Cal. Const. art. II, § 6.)

Because this interest is so important, I cannot join in Justice Grodin's approach. His conclusion that the First Amendment may well bar restrictions on political endorsements of candidates for nonpartisan office is premature. The Legislature may be able to fashion a permissible limitation on partisan involvement in nonpartisan campaigns after careful scrutiny of the various interests at stake. I do not think that at this stage we should sweepingly discourage such an attempt. The majority opinion, of course, does not take that path.

Id. at 625, 692 P.2d at 247, 209 Cal.Rptr. at 483 (Lucas, J., concurring) (emphasis added).

Justice Joseph Grodin filed a concurring opinion in which he commented that if article II, section 6 had been construed by the majority to bar a political party from endorsing, supporting, or opposing a candidate for nonpartisan office, the statute would violate the first amendment to the United States Constitution. *Id.* at 621, 692 P.2d at 244, 209 Cal.Rptr. at 480 (Grodin, J., concurring). Retired Courts of Appeal Justice Sims concurred in the order of the court discharging the writ as moot. Justice Sims, joined by Justice Potter, expressed the view that "the state, in pursuit of the laudable aim of freeing judicial offices from partisan consideration has properly served *a compelling interest* by limiting the elections in which the statutorily created party may officially participate." *Id.* at 626, 692 P.2d at 247, 209 Cal.Rprt. at 483 (Sims, J., concurring) (emphasis added).

It is clear from the majority opinion and the observations of Justices Lucas and Sims that six members of the seven-person panel were of the view that there are "persuasive reasons why it is

preferable for political parties to refrain from endorsing or opposing nonpartisan candidates." *Unger II,* 37 Cal.3d at 620, 692 P.2d at 243-44, 209 Cal.Rptr. at 479-80. The factual justification for precluding party endorsement was not set forth in Justice Mosk's opinion. The sordid background of party control and corruption of judicial and local offices was eloquently set forth, however, in Justice Sims' concurring opinion. *Id.* at 631, 692 P.2d at 251, 209 Cal.Rptr. at 487 (Sims, J., concurring). Thus, six out of seven members of the *Unger II* court appear to have been persuaded that a compelling interest still existed in 1984 that would support a law in California barring official endorsement or opposition by political parties.

In response to the majority's interpretation of California's article II, section 6 in *Unger II* as not *expressly* precluding party endorsement or opposition in a nonpartisan election, Assemblyman Richard Mountjoy introduced Assembly Constitutional Amendment 7 to add subsection (b) to article II, section 6. California voters adopted subsection (b) by a vote of 2,292,678 to 1,805,305 on June 3, 1986. Thus, the reformation of California law to protect the independence of the judiciary and remove local offices from the control of political parties, which began in 1911, was completed 75 years later. In 1986, a majority of Californians approved an initiative that expressly spelled out that the political reforms inspired by Hiram Johnson's populist political revolution cannot be fulfilled if party endorsement or opposition of nonpartisan candidates for judicial and local office is tolerated.[3]

---

[3] The initiative was presented to the voters in this manner:

To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.

WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?

WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN—NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW—BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?

III

INDEPENDENCE OF THE JUDICIARY: A COMPELLING CALIFORNIA IMPERATIVE

California's determination to eliminate political party domination of judicial and local office holders because of its sad experiences with the impact of party influence on the integrity and independence of elected officials led inexorably to the adoption of subsection (b). As noted by Judge Trott in the majority opinion in *Geary v. Renne,* 880 F.2d 1062 (9th Cir.1989), *reh'g granted en banc,* 895 F.2d 1230 (9th Cir.1990), this court should not ignore "the importance of considering a law in the context of the historical circumstances that gave rise to it." *Id.* at 1073.

The majority has failed to consider or discuss the devastating effect that California's political parties had on the integrity and independence of its judges and local office holders as the result of payoffs, graft, and corruption. This sordid record inspired the populist revolution against the corrupt domination by political parties over the daily lives of California's citizens. I believe that California's voters have applied inspired logic to eliminate the evils brought about by party control of judicial and local office elections, by enacting legislation to make these offices nonpartisan. I agree with my colleagues that subsection (b) places a burden on first amendment rights requiring strict scrutiny to determine whether the state has demonstrated that this restriction

---

Californians do not want their judges to become beholden to political parties.

UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.

Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.

Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

California Ballot Pamphlet at 26.

on protected activity is supported by a compelling state interest. Majority op. at 283 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1019-20, 103 L.Ed.2d 271 (1989)). None of the cases cited by the majority, however, analyzes the question whether a state may burden first amendment rights by precluding party endorsements in nonpartisan elections.

In this case, the record amply demonstrated that subsection (b) is necessary to meet California's compelling interest in maintaining the independence of the judiciary. Regrettably, the majority make no reference to the compelling and uncontradicted testimony presented to the district court by former Associate Justice Winslow Christian. Justice Christian clearly qualifies as an expert on the potentially devastating impact of politics on judicial independence in California. Justice Christian served as a trial judge in Sierra County for four years. He was an associate justice of the California Courts of Appeal for 17 years. He was also the Executive Director of the National Center for State Courts for several years. Justice Christian testified that this position enabled him to study the judicial selection and tenure systems in many states. He also "learned that in certain states partisanship in judicial elections has damaged the reputation of the judiciary." Justice Christian declared:

> [ ] The state of California has a compelling interest in the independence and integrity of its judiciary. Even the mere appearance of improper influence over members of the judiciary erodes the public's confidence in its officials and institutions.
>
> [ ] In my opinion, the independence of the California judiciary which is subject to election or public confirmation has depended upon the nonpartisan nature of judicial elections. Permitting partisanship in the process of nominating, selecting and retaining judges would force judges to seek party endorsements. This process would create a risk of judicial candidates being tempted to promise to take party positions on legal issues which are pending or likely to arise. This harmful feature of partisanship in judicial elections has damaged the reputation of the judicial systems of certain other states known to me. The

> mere possibility of such political "deals" would undermine public confidence in the administration of justice.
>
> [ ] Endorsements of judicial candidates by political parties differs from endorsements by other groups or individuals because political party endorsements tend to call for commitments on political and social issues conflicting with the overriding commitment a judge should hold to . . . fair and unbiased administration of justice.
>
> [ ] In my opinion, therefore, partisan endorsements in nonpartisan judicial elections undermine the state's compelling interest in the independence and integrity of its judiciary.

By voicing his concern that a political party would expect a judicial candidate to adopt its platform on controversial issues that are likely to come before the court, Justice Christian sharply focuses on the clearest threat to the independence of the judiciary presented by permitting political parties to endorse or oppose a candidate for a nonpartisan office. As illustrated by the letter sent to candidates for a nonpartisan office in *Unger I*, 102 Cal.App.3d at 683, 162 Cal.Rptr. at 612, political parties are interested in learning whether those persons soliciting their endorsement and financial support are loyal and registered members of their political organizations and whether they hold views that are faithful to their platforms.

The 1990 California Democratic Party platform contains the following positions on issues important to that political group:

> The Agricultural Labor Board, which held such promise for often exploited farm workers, has suffered from appointees and policies hostile to the interests to farm workers. . . .
>
> There should be an immediate halt to off-shore oil development. . . .
>
> We call for a halt to the production, use, and development of nuclear power until safe methods of mining, transport, and disposal of nuclear waste are available. . . .

We must eliminate the use of pesticides and other agricultural chemicals found to be harmful to humans, the environment or food production. . . .

Students with limited English proficiency must have every opportunity to learn English through strong bilingual education. . . .

Race has been found to influence the likelihood that a person charged with capital murder will receive the death sentence, with minorities more likely to face execution and longer sentences. . . .

The California Democratic Party believes that reproductive freedom of choice is every woman's fundamental right and that such a decision is private. . . .

We pledge to actively oppose efforts to further erode the application of the 1973 *Roe v. Wade* Supreme Court decision on abortion rights.

In view of the 1986 United States Supreme Court decision in *Bowers v. Hardwick* [ ], the California Democratic party supports the repeal of all laws that criminalize private sexual conduct between consenting adults.

California Democratic Party 1990 Platform 5, 7, 8, 12, 17, 19, 21 (Democratic State Cent.Comm.1990).

The most recent California Republican Party Platform was adopted in 1988. It includes the following issues in its listing of the Republican Party's highest priorities:

The Republican Party steadfastly opposes the unwarranted grape boycott. . . .

A new chairperson, general counsel, and majority have been appointed to the Agricultural Relations Board to provide fairness and balance for farmers as well as farm workers. . . .

The health and welfare of the worker, grower and consumer are uppermost in the minds of California agricultural officials when dealing with pesticides. . . .

Governor Deukmejian and the Republican Party fully support implementation of the death penalty. . . .

The Republican Party supports reasonable limits on the growth of state welfare expenditures. . . .

The more state government taxes, spends, borrows and regulates, the less room there is for the private sector to grow. Unlike the Democratic Party, Republicans believe in a limited government, which taxes and spends only what is necessary to provide essential state services. . . .

The Republican Party believes that all laws, practices and customs that constrain or otherwise adversely influence qualified people's movement between education and jobs, from choice of occupation and disincentives to seeking gainful employment should be removed. . . .

1988 California Republican Platform 2, 4, 9, 12 (California Republican Party 1988).

Before making an endorsement or offering financial assistance, it is reasonable to assume that a political party will conduct an inquiry to ascertain whether the views of the candidate are consistent with the party's political stand. It is self-evident that a political party would not endorse or spend money to support a person whose views are antagonistic to its platform.

Almost every contemporary social issue from abortion to vivisection can result in a lawsuit seeking a declaration by a judge on the merits of the controversy. What kinds of questions might be posed to the judicial candidate seeking endorsement or financial support of his political party? Candidates in recent California elections have been asked for their views by political reporters on the following contemporary and social issues:

1. Do you believe that the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment?

2. Do you agree with the five-person majority in the Supreme Court that the first amendment protects burners of the American flag?

3. Do you believe that a pregnant woman has the unrestricted right to choose whether she will have an abortion for gender preference purposes?

4. Do you believe that the federal Constitution authorizes a state governor to make political appointments based solely on a quota system without regard to merit? For example, should women be selected to fi.. all job vacancies until they comprise 50% of our state government's work force?

5. Do yo believe that blacks should be given preference over white applicants, without proof that an employer discriminated, to make up for the fact that slavery was protected by law, and racist practices have denied blacks equal rights in this country?

6. Should oil drilling be permitted off California's beautiful coastline?

7. Should our environmental protection laws be interpreted so as to protect spotted owls and old trees notwithstanding the fact that thousands of jobs will be lost?

8. Do you believe that we should concentrate our tax dollars on treating and rehabilitating addicts instead of building more prisons to lock up narcotics offenders for long prison terms?

9. Do you believe that handgun control laws are in conflict with our rights under the second amendment?

10. Do you believe that state laws restricting the type of jobs that can be performed by AIDS patients violate the federal Constitution?

11. Do you believe in decriminalization of the use and possession of drugs?

12. Do you believe that illegal aliens should be denied welfare benefits?

13. Do you believe that all drunk drivers, including first offenders, should be imprisoned, instead of receiving fines or probation, because they are all potential killers?

14. Do you believe that all juvenile gang members, regardless of their age, should be sentenced as adults so as to deter gang membership?

15. Do you believe our no-fault divorce laws have resulted in forcing women with children into poverty while former husbands continue to maintain their lifestyles, especially upon remarriage?

16. Do you believe it is appropriate for a judge to give a defendant less punishment than he deserves in exchange for a plea of guilty?

17. Do you believe it is appropriate for judges to order local officials to change the size or shape of electoral district boundaries so as to ensure the election of a member of a minority?

18. Do you believe that rent control laws force private citizens to subsidize low-cost housing?

19. Do you favor consolidating school districts such as Beverly Hills, Santa Monica, and Los Angeles to achieve integration and avoid mandatory busing?

20. Would you uphold the constitutionality of a statute that required all *able-bodied persons* to work on a public project in exchange for welfare benefits?

21. Do you believe that all court-made rules that exclude relevant evidence in criminal cases solely because "the constable blundered" should be overturned?

22. Do you favor limiting damages in civil personal injury cases to out-of-pocket expenses such as medical bills and loss of wages in order to decrease the cost of insurance?

23. Do you believe in a free market economy or do you favor government regulation?

24. Do you believe that we should "soak the rich" or "reduce taxes for the wealthy to stimulate investment," or that everyone should pay approximately the same percentage of his or her income to pay for government benefits and services?

25. Do you believe that mandatory drug testing should be a condition of employment?

Without a law barring endorsement of candidates for judicial office, we can reasonably expect that curious members of screening committees will ask similar questions to test the social and political philosophy of persons soliciting party endorsement or financial support. A sturdy and resolute candidate mindful of the canons of ethics for judicial candidates, should, of course, refuse to answer any of these questions. A frightened incumbent who has been subjected to media criticism for an unpopular decision, or a less scrupulous, politically lean and hungry[4] aspirant for judicial office might be tempted, as predicted by Justice Christian, "to promise to take party positions on legal issues which are pending or likely to arise."[5]

---

[4] *See* W. Shakespeare, *Julius Caesar,* act I, scene ii, 11. 194-95 ("Yond Cassius has a lean and hungry look. . . *such men are dangerous.*" (emphasis added)).

[5] The fact that social issues can be successfully exploited to influence the outcome of a contested judicial election is vividly illustrated by the political fate of Los Angeles Superior Court Judge Alfred Gitelson in the 1970 general election.

Sometime prior to 1970, Judge Gitelson ordered the Los Angeles Unified School District to integrate its classes. Judge Gitelson sought reelection in 1980. Attorney William P. Kennedy ran against Judge Gitelson and forced him into a runoff election. The day after the primary election, Mr. Kennedy summarized his campaign in the following press statement:

> My objection to the judge is based primarily on his decision requiring school integration by forced bussing. . . . [This election is] a referendum by the voters of Los Angeles on the issue. If they want forced bussing, vote for Gitelson, if not, vote for me.

Boyarsky, *Gitelson Forced into Runoff: Bussing Is Issue, His Foe Says,* L.A. Times, June 4, 1970, at 24, col. 3.

Mr. Kennedy did not explain to the press that his public position on a matter pending in the court system would, of course, compel his recusal, if elected, on any matter involving school integration or "forced bussing."

Judge Gitelson defined the issue raised by Kennedy's campaign strategy differently:

Because of the real possibility that candidates will have to undergo such an inquisition in pursuit of the dangling carrots of financial support and party endorsement, subsection (b) of article II, section 6 serves California's compelling interest in safeguarding the independence of its judiciary.

Justice Christian's testimony and the historical evidence of the disastrous impact on the independence of the judiciary and the integrity of local officials that resulted from party selection and endorsement was uncontroverted at these summary judgment proceedings.

The historical record shows that, while California's political parties still controlled local elections, one political leader threatened the City Council of Los Angeles with the economic destruction of the community and another bribed 17 out of 18 members of the San Francisco Board of Supervisors. The burden of showing that the citizens of California have a compelling state interest in avoiding Mephistophelean compacts[6] between political

---

> If judges are going to make their decision[s] on the basis of what people would like, then there can't be any justice.

Id. at 1, col. 5. Judge Gitelson lost the election to Mr. Kennedy on November 3, 1970. The Supreme Court of California affirmed Judge Gitelson's decision on June 28, 1976, *Crawford v. Board of Educ.,* 17 Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976).

If the Kennedy-Gitelson election campaign were being conducted in this election year, without the protection of subsection (b) of article II, section 6, the political parties would have the opportunity to endorse or oppose the candidates' positions in this nonpartisan election. If a party adopted Mr. Kennedy's point of view, either out of conviction or simply because he is a loyal member, it would be entitled to endorse him and ask the voters to vote "no" on bussing. By the same token, another party would be free to support Judge Gitelson, regardless of his views or qualifications, to avoid losing that office to a candidate who was registered with a rival political organization. The people of California have wisely chosen to preclude the injection of state central committee partisan concerns and "priorities" in elections dealing with local problems that require nonpartisan solutions.

[6] I will bind myself to your service in this world.
To be at your beck and never rest nor slack;
When we meet again on the other side,

parties and nonpartisan candidates has been met by the officials of the City and County of San Francisco who are parties to this action.

IV

SUBSECTION (B) AS THE ONLY REALISTIC SAFEGUARD OF POLITICAL INDEPENDENCE

Finally, subsection (b) is narrowly tailored to satisfy California's compelling interest in freedom from party influence. Applying the lessons of history and experience, the state of California has focused its restriction on the organizations central to the political influence that has caused such disruption in its past. The majority, however, claims that less drastic means could be employed to further the goals of nonpartisanship. It relies on the district court's finding that

> the State could adequately safeguard the interests § 6(b) was designed to protect by less drastic means, including provision for nonpartisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates.

Majority op. at 285.

The majority's analysis confuses preservation of the *appearance* of political independence with avoiding the actual lure of party influence. As Justice Rymer notes: "The 'less drastic' possibilities posited by the district court may be links in the chain, *but cannot serve the states' structural interest if there is any missing link.* Rymer dissent at 301 (emphasis added). Justice Christian's declaration demonstrates that party endorsement of nonpartisan candidates, in and of itself, would create a legitimate threat to the entire nonpartisan framework. The majority's proposed less drastic means are thus missing the one link that would actually shield nonpartisan candidates from party influence.

In the same coin you shall pay me back.
Goeth's Faust 58 (L. MacNeice trans.1951).

Indeed, it is hard to imagine any more narrowly drawn restriction that would adequately serve California's compelling state interest in the integrity of judges and local officials. "[A] state need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Stevenson v. State Bd. of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) (Easterbrook, J. concurring); *see also Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974) ("[T]he Constitution does not require the states to choose ineffectual means to achieve its aims.") When one considers the uncontroverted reality of party power in California's history, it becomes clear that subsection (b) *is* narrowly drawn. As Judge Trott noted:

> [Subsection (b)] is limited in its coverage only to those concentrations of power that pose the greatest threat to the objectives of nonpartisanism. All other groups, individuals, and associations are free to do as they please. This protects the free expression and interchange of ideas that the First Amendment is designed to promote. . . .
>
> In addition, article II, § 6(b) is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this "indirect consequence." As such, it compares favorably with the statute at issue in *Eu,* 109 S.Ct. at 1016. It is a marginal and workable restriction on speech incident to a set of election rules designed to promote independence in public office.
>
> Thus, section 6(b) is not the kind of substantial limitation or draconian restriction on free political exchange that rises to the level of incompatibility with the Constitution.

880 F.2d at 1080-81. Because it is the *only* means by which California can avoid political litmus tests for judges and local officials, and thereby ensure the independence that is the goal of nonpartisanism, I belive that subsection (b) is sufficiently narrowly tailored to survive constitutional scrutiny.

Justice Blackmun has noted that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois State Bd. of Elections v. Socialist Workers*

Party, 440 U.S. 173, 188, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring). The majority offers California two watered-down and ineffective alternatives to the only practical means of ensuring political independence. I recognize California's compelling interest in avoiding party influence over nonpartisan candidates and, like Judge Trott, I "do not deem it prudent for the Federal judiciary to conclude without the benefit of the legislative process" that California can adequately safeguard its interests by other means. 880 F.2d at 1080.

I would reverse the district courts's order granting summary judgment. The uncontradicted record demonstrates that California has a compelling interest in maintaining the integrity and independence of its local officials by precluding party endorsement in its nonpartisan elections.

Appendix B

Bob GEARY, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner, and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney, Dianne Feinstein, San Francisco Mayor, Board of Supervisors, City and County of San Francisco, City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 16, 1988.

Decided July 24, 1989.

Appeal from the United States District Court for the Northern District of California.

Before SNEED, CANBY AND TROTT, Circuit Judges.

TROTT, Circuit Judge:

On June 3, 1986, the people of California amended their constitution to add the following provision as article II, § 6(b):

> No political party or party central committee may endorse, support or oppose a candidate for nonpartisan office.[1]

---

[1] Section 35 of the California Elections Code defines "political party" to include those parties that have qualified for the state's primary ballot: the Democratic Party (Cal. Elections Code §§ 8500-8945), the Republican Party (Cal. Elections Code §§ 9000-9510), the American Independent Party (Cal. Elections Code §§ 9600-9745), and the Peace and Freedom Party (Cal. Elections Code §§ 9750-9855). Plaintiffs-appellees argue that Article II, § 6(b) covers all political parties, not just those that are ballot qualified. We disagree, but even if we were to accept this contention, our analysis of the issues in this case would be the same.

In this appeal, we are asked to decide (1) whether this provision is compatible with First Amendment rights of free speech and association, and (2) whether it deprives the individuals and political entities to which it applies of equal protection of the laws as guaranteed by the Fourteenth Amendment. We hold on both counts that the provision is consonant with the United States Constitution, and in so doing we reverse the judgment of the district court.

I

Plaintiffs-appellees in this case are ten registered voters of the City and County of San Francisco, an organization of registered voters, and an officer of that organization. The basis of their complaint as it relates to this appeal was the refusal of defendants-appellants, the City and County of San Francisco and the San Francisco Registrar of Voters, to permit official political party and party central committee endorsements of candidates for nonpartisan offices to be printed in the San Francisco Voter Pamphlet in connection with elections scheduled for June 2 and November 3, 1987. Defendants-appellants based their refusal to print party endorsements on the language of article II, § 6(b).

Plaintiffs-appellees alleged that article II, § 6(b) violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1985. In particular, they claimed that this provision of California's Constitution abridges their individual and collective rights of free speech and association and denies them equal protection under the law. The district court partially granted plaintiffs' motion for summary judgment and entered judgment on their behalf.[2] 708 F.Supp. 278.

---

[2] In its Order Partially Granting Plaintiffs' Motion for Summary Judgment and Directing Entry of a Final Judgment, the district court made the following statements:

> While the State of California may have a legitimate interest in maintaining the nonpartisan character of local, judicial, and school elections, Article II, Section 6(b) of the California Constitution is not a narrowly drafted enactment designed to advance such interest by the least drastic means. On the contrary, California can adequately safeguard such interests by providing for nonpartisan methods of nomination of candidates for such offices and by controlling partisan activities of the candidates—for example, by prohibiting candidates for such offices from soliciting or collecting campaign funds from political parties. Indeed, it appears that California has already taken steps in this direction by adopting nonpartisan nomination methods for all local, school, and judicial offices. See e.g. Cal.Elec.Code Secs. 6400 et seq., 22600 et seq., and 23500 et seq.; Cal. Const., Art. VI, Sec. 16; San Francisco Charter Secs. 9.100-1 and 9.104.
>
> Furthermore, defendants have not made any showing why California has a compelling interest in suppressing endorsements or discussion of candidates for local, school and judicial offices, by political parties and their central committees, but permitting such advocacy and endorsements by other groups, including partisan organizations and special interest groups.

The City of San Francisco then moved to vacate the court's judgment.[3] On June 9, 1988, the district court denied the motion, and this expedited appeal followed. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the grant of summary judgment. *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986).

II

Subsection (b) of article II, § 6 represents a direct response of the people of California to a 1984 decision of their Supreme Court, *Unger v. Superior Court*, 37 Cal.3d 612, 692 P.2d 238, 209 Cal.Rptr. 474 (1984). (*Unger*). At the time *Unger* was decided, article II, § 6 read simply: "Judicial, school, county and city offices shall be nonpartisan."[4] "Nonpartisan offices" were—and still are—defined as "offices[s] for which no party may nominate a candidate." Cal. Elections Code § 37. The issue before the court in *Unger* was whether this provision barred the Republican Party from endorsing the "nonconfirmation" of the three justices in the

---

[3] By order of this court filed on September 21, 1988, the judgment of the district court was stayed pending further order of this court.

[4] As part of the ballot proposition that added § 6(b) to the California Constitution, § 6 was renumbered as § 6(a) and the word "all" was added as a qualifier to the offices described therein.

1982 General Election.[5] In an opinion in which four justices, including the current Chief Justice, wrote separately, a divided *Unger* Court held that article II, § 6, as it then read, did not prohibit a political party or its governing body from "endorsing, supporting or opposing candidates for nonpartisan office." *Unger,* 37 Cal.3d at 615, 692 P.2d at 240, 209 Cal.Rptr. at 476.[6] Justice Sims in dissent, wrote a lengthy opinion in which he meticulously surveyed the historical background of California's nonpartisan political traditions. He also discussed at length the First Amendment implications of this issue, as did Acting Justice Grodin in a separate concurrence.

In 1986, Assemblyman Richard Mountjoy, a member of the California Assembly since 1978, sought to reverse the effect of *Unger* by introducing Assembly Constitutional Amendment 7. This amendment proposed adding subsection (b) to article II, § 6. After successfully wending its way through the legislative process as provided in article XVIII, §§ 1 and 4 of California's Constitution, this remedial proposal was submitted to the people as Proposition 49 on the June 1986 ballot. The voters approved it by a vote of 2,292,678 to 1,805,305.[7]

---

[5] For a detailed study of events and controversy attending recent confirmation elections of the Justices of the California Supreme Court, *see* Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. 333 (1988).

[6] Although the general election of November 1982 with which this lawsuit was concerned had already taken place by the time of the California Supreme Court's decision in *Unger,* the Court decided the case in any event, noting with considerable clairvoyance that "the issues raised are of general public interest and will likely recur in future elections." We note that the controversy over partisan involvement in elections continues unabated, this lawsuit being but one example.

[7] Of the 58 counties in California, Proposition 49 carried in 55. The three counties in which it failed to carry were Alameda, Los Angeles and San Francisco. The overall percentage of the vote was 55.9% for; 44.1% against. Statement of Vote, June 3, 1986 Primary Election (on file at U.S. Circuit Court Library, San Francisco, California).

III

To evaluate a constitutional challenge to an election law, we must first consider the character and magnitude of the injury to First Amendment rights allegedly presented by the law. *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983) (*Anderson*). We then determine whether or not the interests cited by the state to justify this injury are compelling and the "extent to which [they make] it necessary to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789, 103 S.Ct. at 1570, *Eu v. San Francisco County Democratic Central Committee,* ___ U.S. ___, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 (1989), *aff'g* 826 F.2d 814 (9th Cir.1989) (citations omitted (*Eu*). Finally, we must establish whether the law in question is narrowly tailored to serve the specified interest. *Id.*

This method of analyzing the proper judicial response to a constitutional challenge to an election law is useful in helping us to identify the constitutional and policy considerations that compete in such cases. Application of this method does not, however, automatically produce a decision. In the end, there is "'no substitute for the hard judgments that must be made.'" *Anderson,* 460 U.S. at 789, 103 S.Ct. at 1570 (citation omitted). We do not wish to pretend that our common sense and experience have no influence on our attempt to balance First Amendment and state interest considerations in the context of section 6(b).

IV

There can be no doubt that article II, § 6(b) constitutes a substantial limitation on the First Amendment rights of party members both to associate and to speak publicly and collectively regarding the qualifications of persons running for significant public offices. Political expression, in general, and speech uttered during a campaign for political office, in particular, enjoy the broadest protection of the First Amendment. *See Eu,* 109 S.Ct. at 1020; *Buckley v. Valeo,* 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) *(Buckley)*. Moreover, "any interference with the freedom of a [political] party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New*

Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957) *(Sweezy); Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 215, 107 S.Ct. 544, 549, 93 L.Ed.2d 514 (1986) *(Tashjian); Eu,* 109 S.Ct. at 1016; *see also NAACP v. Button,* 371 U.S. 415, 438-39, 83 S.Ct. 328, 340-41, 9 L.Ed.2d 405 (1963). These rulings apply to state laws through the Fourteenth Amendment. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

Section 6(b)'s prohibition against party support for or opposition to a nonpartisan candidate also raises First Amendment concerns. The Court has held that conduct and communication are essentially indistinguishable in this context. *See Buckley,* 424 U.S. at 19, 96 S.Ct. at 634 ("[A] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restructuring the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

Insofar as article II, § 6(b) limits political expression and association, it imposes a type of restriction whose constitutionality is suspect. We must therefore examine Section 6(b) with exacting scrutiny as we seek to determine whether on balance it is compatible with First Amendment values. *Eu,* 109 S.Ct. at 1020-21; *Brown v. Hartlage,* 456 U.S. 45, 52-53, 102 S.Ct. 1523, 1528-29, 71 L.Ed.2d 732 (1982) *(Brown).*

Despite the fact that section 6(b) limits highly protected expression, four factors mitigate its offensiveness to the Constitution. These redeeming features of section 6(b) are as follows:

(1) It expands rather than constricts the political process, avoiding a concentration of power in the dominant political parties.

(2) It applies only to a limited number of organizations, leaving individuals and an unlimited number of other groups,

ad hoc or otherwise, to speak, endorse, or support as they please.

(3) It pertains to carefully selected intrastate nonpartisan offices, not offices of national scope.

(4) Its limitation on First Amendment activities compares favorably with other similar restrictions previously approved by the Supreme Court.

We discuss each of these features in turn.

1. Section 6(b) Expands the Political Process

We take the view that a restriction on political speech such as section 6(b), whose dominant effect is to open the process to more diverse interests, groups, and individuals, or to prevent the political process from becoming clogged and unworkable, inflicts a less severe injury on peoples' First Amendment rights than does a restriction that leads to a concentration of political power. This view finds ample support in Supreme Court opinions. Those cases striking down restrictions on political expression often base their decisions on the need for an open political process that will accommodate a variety of groups and interests. In *Anderson,* for example, the Court justified its decision to strike down Ohio's early filing deadline for statements of candidacy on the grounds that it unfairly burdened new or small political parties and independent candidates. *See* 460 U.S. at 789, 103 S.Ct. at 1570 ("By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.") (citations omitted); *see also Storer v. Brown,* 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 39 L.Ed.2d 714 (1974) (warning against regulations that "confer an effective political monopoly on the two major political parties") *(Storer), Sweezy,* 354 U.S. at 251, 77 S.Ct. at 1212 ("All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority,

dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.").

By contrast, in cases that uphold the constitutionality of restrictions on political expression the Court often grounds its judgments on the fact that the limitation does *not* restrict access to the political arena, or is necessary to preserve the integrity of the electoral process. In *Jenness v. Fortson,* for example, the Court upheld the constitutionality of Georgia's filing deadlines because "[u]nlike Ohio's [Georgia's election laws] do not operate to freeze the political status quo." 403 U.S. 431, 438-39, 91 S.Ct. 1970, 1974-75, 29 L.Ed.2d 554 (1971) (*Jenness*); *see also Storer,* 415 U.S. at 730-33, 94 S.Ct. at 1279-80 ("The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot. It involves no discrimination against independents.").

In a sense, section 6(b) simply prevents political parties as such from dominating an area designed to remain open to everyone. It promotes the vitality and fluidity of the political process rather than setting it in concrete. Section 6(b) is the type of law the Court regarded favorably in *Anderson* and *Sweezy*. This interpretation of section 6(b) depends, of course, on the legitimacy of the judgment endorsed by California's electorate that permitting partisan political parties, with all their wealth, power, and expertise, to move into the non-partisan arena necessarily operates to restrict the room that is now available there to members of nonqualified parties and candidates who are truly independent. We will discuss this judgment, and its basis in California's history, later in this opinion.

2. Section 6(b) Does Not Unnecessarily Restrict Political Debate

The magnitude of the injury imposed by section 6(b) is diminished by the fact that this provision governs the activities of organizations, not individuals: It keeps no natural person in California from the ballot, and it prevents no such person from supporting, endorsing, opposing, or voting for the candidate of his

or her choice. *Sweezy,* 354 U.S. at 250, 77 S.Ct. at 1211, *Tashjian,* 479 U.S. at 215, 107 S.Ct. at 549, and *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1987)[8] notwithstanding, we see this as an important distinction in analyzing the character and magnitude of the assessed injury in this case. The distinction both ameliorates the character and diminishes the magnitude of the injury under examination. Any member of any political party or central committee in California, or any group of members (ad hoc or otherwise), is free to endorse, support, or oppose any candidate for nonpartisan office so long as the individual or group does not purport to speak or act for the party. Similarly, any such individual may run for any of the nonpartisan offices in question, even though he himself is closely identified with a political party or even the chairman of its central committee. In addition, and importantly, article II, § 6(b) does not "censor[ ]the political speech a party shares with its [own] members," "prevent[ ]party government bodies from stating whether a [partisan] candidate adheres to the tenets of the party . . . " "[n]or hamstring[ ]voters seeking to inform themselves about the [party's] candidates and the campaign issues." *Eu,* 109 S.Ct. at 1020. We see these points as major distinctions between this case and *Eu*. In sum, we do not see Section 6(b)'s impact on political debate as draconian.

---

[8] In *First National Bank of Boston v. Bellotti,* the Court observed that "[t]he court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular serves significant societal interests. The proper question therefore is not whether corporations "have" rights and, if so, whether they are coextensive with those of natural persons. Instead, the questions must be whether [the limitation complained of] abridges expression that the First Amendment was meant to protect." 435 U.S. at 775-76, 98 S.Ct. at 1415-16. We accept this guidance in assessing the character of the asserted injury in this case, but we believe that in this context it does not prevent us from making the distinctions that we have.

3. Section 6(b) Concerns Only Intrastate Nonpartisan Offices

The weightiness of section 6(b)'s infringment on free speech on the scale of constitutional injuries is also lessened by the character of the elections and offices that fall with its scope. The elections to which section 6(b) applies are statewide or local elections. The winners of section 6(b) contests do not generally travel to Washington, D.C. or the national party conventions—they tend to stay at home and contend with the problems of their respective states or municipalities. In *Anderson,* the Court found the state's interest in regulating matters of statewide or local interest to be more compelling than its interest in regulating national elections. 460 U.S. at 795, 103 S.Ct at 1573 ("[T]he State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries. . . . The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.") *See also Cousins v. Wigoda,* 419 U.S. 477, 483, 95 S.Ct. 541, 545, 42 L.Ed.2d 595 (1975) ("[c]onsideration of the special function of delegates to . . . a [National Party] Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest."). Moreover, our Constitution reflects the judgment that it is important to exempt judges from the sphere of political influence. *See* U.S. Const., article II, § 2 and article III, § 1. We see no reason why this proposition should not apply to state judges with equal force. Although these observations—including the priority we afford to removing judicial decisions from political influence—go primarily to the compelling interest of the state test, they are also relevant to the character and magnitude of the asserted injury.

4. Section 6(b) Compares Favorably With Similar First Amendment Restrictions

The asserted injury that section 6(b) inflicts on freedom of speech stands in favorable contrast to other injuries to fundamental First Amendment activities that the courts have sanctioned over the years. For example, section 6(b)'s limitation on individu-

als' First Amendment rights is less severe than those imposed by restrictions on the political activities of federal employees that the Court has upheld. *See CSC v. Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 2882, 37 L.Ed.2d 796 (1973) (approving the constitutionality of 5 U.S.C. § 7324(a)(2)) (the Hatch Act), which prevents many thousands of federal employees from holding a party office, working at the polls, acting as a party paymasters, politicking for a partisan candidate, raising funds for a partisan candidate or political party, managing the partisan candidate campaign, serving as delegates to a party convention, etc.) (*Letter Carriers*).[9] And, on the same day it decided *Letter Carriers,* the Court approved, over similar First Amendment objections, the Oklahoma Merit System of Personnel Administration Act which includes as section 818, paragraph 7, an extremely harsh prohibition against personal speech, association, and other political activity. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Section 818, paragraph 7, states:

> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member *of a partisan political club,* or a candidate for nomination or election to any paid public office, *or shall take part in the management or affairs* of any political party *or* in

---

[9] The office of the Special Counsel, U.S. Merit Systems Protection Board issues a booklet to federal employees listing the dos and don'ts of political activity. We note that it was distributed to all federal judges on September 16, 1988, with a copy of the following resolution adopted at its September 1943 session by the Judicial Conference of the United States:

> "Whereas with rare exceptions the officers and employees of the Federal courts have kept free from political activities during their terms of service, but it seems desirable to guard against deviations from this course, and for that purpose to recommend a standard: Therefore be it resolved, that it is the sense of the Judicial Conference that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the executive branch of the government by the Hatch Act (18 U.S.C. 61h)."

any political campaign, except to exercise his right as a citizen *personally* to express his opinion and to cast his vote."

Okla.Stat.Ann. Tit. 74 § 818 (1965) (Emphasis supplied).

Section 6(b) is also more hospitable to First Amendment concerns than the result in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973) (*Rosario*) which permits a state to deny altogether a person's right to vote in the primary election unless enrolled in that party "approximately eight months prior to a presidential primary . . . and eleven months prior to a nonpresidential primary." The holding in *Rosario* is particularly striking when read in the light of the Supreme Court's previous holdings to the effect that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964) (voting is " 'a fundamental political right . . . preservative of all rights.' ")

In addition, section 6(b)'s limitation is less severe than the "sore-loser" restriction approved in *Storer*, 415 U.S. at 730, 94 S.Ct. at 1279, and it contrasts favorably also with *Jenness*, 403 U.S. at 438, 91 S.Ct. at 1974, which, in the interest of maintaining manageable ballots, permits a state to keep the name of an independent candidate for office off a ballot unless the candidate is able to secure a nominating petition signed by a certain number of qualified electors. Article II, § 6(b) also appears less onerous than the practice—under the banner of "appropriate regulation" —of refusing to permit a political party as such to have any access whatsoever to the ballot because it failed to garner a sufficient number of votes in the previous election. *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Moreover, California's regulation is less harsh than other constitutionally acceptable regulations that flatly deny a candidate's access to a ballot unless the candidate can demonstrate the seriousness of his candidacy, *see Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d (1972), or unless the candidate satisfies a 7-year durational residency requirement, *see Chimento v. Stark*, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973), *summarily aff'g* 353 F.Supp. 1211 (D.N.H.).

On the other hand, article II, § 6(b) appears to be more far-reaching than—or at least on a par with—Kentucky's restriction on certain speech by candidates for office which was disapproved in *Brown*, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). In that case, the Supreme Court struck down restrictions as to what campaigning candidates could promise to the voters in connection with the salaries of the offices for which they were running. Relying on *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966), for the proposition that ". . . there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs . . . ," the Court issued a strong caution against restricting the offer of ideas by a *candidate* to the voters. *Brown*, 456 U.S. at 52, 102 S.Ct. at 1528. Section 6(b) contains no such restrictions. And, the provision under scrutiny here shares certain identifiable characteristics with the limitation on speech and association tested and found wanting in *Eu*. In that case, the Supreme Court struck down provisions of the California Election Code forbidding the official governing bodies of political parties from endorsing candidates in their *own* party primaries. *Eu*, 109 S.Ct. at 1025. As indicated, however, we believe that the First Amendment injuries in *Eu*, although similar in some important aspects to the injuries in this case, are quite dissimilar in others, and that the interests advanced in the two cases are distinguishable.

V

California law has consistently reflected the judgment that it is in the state's interest to designate judicial, school, county, and city offices as nonpartisan.[10] By definition, a nonpartisan office is an

[10] In 1913, California passed a statute providing that: "[i]n the case of a nomination paper for any candidate for a judicial office, school office, county office, or township office, the provisions of this subdivision shall apply *except that no such nomination paper nor any section thereof shall contain the name of any political party, or any signer thereto, nor shall the candidate be referred to as a candidate for the nomination of any party.*" *See Unger*, 37 Cal.3d at 633, 692 P.2d at 253, 209 Cal.Rptr. at 489 (emphasis added) (citation omitted) (Sims, J., dissenting). The

office that is independent from partisan politics. By California law, a nonpartisan office is an office whose occupants have neither been nominated nor endorsed, supported, or opposed by a political party.[11] *See* Cal. Elections Code § 37; Cal. Const. art. II, § 6(b). Section 6(b) thus represents a particular means of attempting to ensure that nonpartisan offices are nonpartisan in fact as well as in name.[12]

---

prohibition on nomination of candidates for these offices by political parties was incorporated into article II, § 2¾ of California's Constitution in 1926. Article II, § 2¾ became article II, § 6 in 1976, and was redesignated as article II, § 6(b) in 1984 with the passage of Proposition 49.

[11] The restrictions on nomination and endorsement are the basic laws giving shape to nonpartisan offices in California. We note, however, that California law also prohibits the appearance on the ballot itself of party affiliation of a candidate and requires that partisan and nonpartisan contests be listed separately when presented to the voters in the voting booth. *See* Cal. Elections Code §§ 10200.5, 10207.

[12] Other states have chosen a variety of means of attempting to preserve the independent character of judicial and other nonpartisan elections. Colorado, Indiana, and Missouri prohibit judges from campaigning for any political party. Colo. Const. art. VI, § 18; Ind. Const. art. 7, § 11; Mo. Const. art. 5, § 25(f). Florida prohibits judicial candidates from campaigning as a member of a political party or from accepting funds from political parties. Fla.Stat.Ann. § 105.071. (West Supp.1988). Florida also prohibits political parties from endorsing, supporting or assisting in judicial campaigns. Fla.Stat.Ann. § 105.09 (West 1982). Georgia prohibits political parties from nominating judges in nonpartisan elections. Ga. Code Ann. § 34-1016.1 (Supp.1988). Louisiana prohibits its Educational Television Authority from supporting or opposing any political candidate. La.Rev.Stat. Ann. § 17:2506 (West 1982). Mississippi prohibits judges in primary elections from aligning themselves with any other candidate or faction within his party. Miss. Code Ann. § 23-15-973 (Supp.1987). Montana prohibits nonpartisan candidates from indicating their political affiliation in their declarations for nomination. Mont. Code Ann. § 13-14-112 (1987). The state also prohibits political parties from endorsing or contributing to the campaign of judicial candidates and justices of the peace. Mont. Code Ann. §§ 13-35-231, 3-10-201(4) (1987). New Jersey prohibits political parties from endorsing candidates before the primary elections. N.J. Rev.Stat. § 19:34-52 (1964). Thus, party screening committees are prohibited. *Cavanagh v. Morris County Democratic Comm.*, 121 N.J.Super. 430, 297 A.2d 594 (Ch.Div.1972). However, individuals may express their support for a candidate even though they are party officials. *Gillen v. Sheil*, 174 N.J.Super. 386, 416 A.2d 935 (Law Div.1980). North Dakota prohibits candidates from identifying their party affiliation in any nominating petition for county offices, judges, and two executive positions. N.D.Cent. Code § 16.1-11-08 (Supp.1987). Section 16.1-11-37 (Supp.1987) also prohibits partisan nominations for these offices. Section 40-21-06 (1968) prohibits candidates for municipal offices from identifying their party affiliation in their nominating petition. The North Dakota political Supreme Court has ruled that these statutes do not prohibit political parties from issuing resolutions or "other forms of support." *Haggard v. Meier*, 368 N.W.2d 539 (N.D.1985). Oklahoma prohibits candidates for judicial offices from making his party affiliation public. Okla.Stat.Ann. tit. 20, § 1404.1 (Supp.1988). Oregon prohibits candidates for nonpartisan office from campaigning as members of a political party. Or.Rev.Stat. § 249.015 (1986). The Oregon Attorney General has ruled that this statute prevents candidates from indicating the party the candidate represented in the legislature. 36 Op.Ore. Att'y Gen. 55 (1972). South Dakota prohibits parties from endorsing or nominating judicial candidates. S.D. Codified Laws Ann. § 12-9-2 (1982). And Wyoming prohibits parties from contributing to any candidate in its primary election. Wyo.Stat. § 22-25-104 (1977).

California's interest in section (b) may therefore be identified with its interest in the impartial administration of government. Defendants-appellants state that by prohibiting political parties from supporting, endorsing, or opposing candidates for nonpartisan office, California wishes to ensure that the officials elected will be accountable to the voters rather than to the parties. Mayor Bradley of Los Angeles also links section 6(b) with the effort to make government responsive and responsible to the people as a whole. In his amicus brief in support of defendants-appellees, Mayor Bradley asserts: "[P]ermitting political parties to endorse candidates for local elections will result in undue partisan influence and control over those officials; it will undermine their independence to solve problems faced by local government and will threaten the fair and impartial administration of the law." Significantly, Mayor Bradley perceives the threat party endorse-

ments pose to the independence of nonpartisan officials not as "the impact that endorsements may have on voters' choices but rather [their] indirect impact on elected officials' independence from partisan political pressures."[13] As the holder of a nonpartisan office as well as a former partisan candidate for governor of California and a leader of his party, Mayor Bradley brings considerable relevant experience to assessing the need for section 6(b).

Supreme Court case law and the Constitution require the conclusion that California has a compelling interest in seeking to promote fair government and minimize the sort of "undue partisan influence and control" Mayor Bradley describes. In *Letter Carriers*, for example, the Court found the Hatch Act's restrictions on the political activities of government employees to be justified by "this great end of government—the impartial execution of the laws." 413 U.S. at 565, 93 S.Ct. at 2890. In support of this conclusion, the Court wrote:

> [I]t is essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like

---

[13] Judge Canby asserts in his dissent that our concern is with the effect of political endorsement on the voters, not on the candidates. As our reliance on Mayor Bradley's statement suggests, Judge Canby is incorrect. To imply that nonpartisan candidates might not feel compelled to seek party endorsements is to ignore the structure of our political system. Our system is fundamentally a two-party system in which association with the Democratic or Republican party makes it possible for a candidate to call on pre-existing support for that party and the party's organizational backing. As long as this system is in place, nonpartisan candidates will find it desirable to obtain party support. Our concern is with the pressure party endorsements put on nonpartisan candidates to adopt views acceptable to a major party, and not, as Judge Canby states, with the possibility that voters would attach "the wrong meaning" to the party's endorsement. We see section 6(b) as making it possible for nonpartisan candidates not to be beholden to political parties rather than as a means of keeping information from the voters.

> these will reduce the hazards to fair and effective government. . . .
>
> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representing Government is not to be eroded to a disastrous extent.
>
> Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to main its political structure and political campaigns. . . .
>
> A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. . . . It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another.

413 U.S. at 565-66, 93 S.Ct. at 2890-91.

And, in dealing with an equal protection challenge to a provision of the constitution of Texas prohibiting certain officers from

running for the state legislature during their terms in office, the Supreme Court spoke of the potential of politics to divert an office holder's attention from the duties of his elected position:

> By prohibiting candidacy for the legislature until completion of one's term of office, § 19 seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office. The demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office. A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with regard to the views of his constituents.

Clements v. Fashing, 457 U.S. 957, 968, 102 S.Ct. 2836, 2846, 73 L.Ed.2d 508 (1982). *See also Elrod v. Burns*, 427 U.S. 347, 368, 96 S.Ct. 2673, 2687, 49 L.Ed.2d 547 (1976).

We can find no authority whatsoever for the proposition that a state or a government entity does not have a compelling interest in having its officer discharge with fidelity to the public interest the duties for which they are responsible. That California's interest are compelling in this regard seems nothing less than obvious, and the district court so held.[14] We also believe that this interest is at least equal—if not greater than—other acknowledged legitimate interests, such as protecting the integrity of the political process from frivolous or fraudulent candidacies, efficiency in the election process, avoiding voter confusion caused by too many candidates on the ballot, and avoiding the expense and burden of run-off elections.

[14] It is this conclusion that most distinguishes this case from *Eu* in which the Supreme Court was unable to find a compelling governmental interest in telling parties how to conduct their internal affairs. 109 S.Ct. at 1022.

Moreover, the Constitution reflects the judgment that the government has a compelling interest in removing the federal judiciary from the danger of political influence. *See* U.S. Const., article III, § 1 (providing that federal judges are to be appointed for life and are not to have their compensation diminished). Amplifying on the view of the judiciary that underlies this provision, the Court has stated:

> [T]here rests upon every federal judge affected nothing less than a duty to withstand any attempt . . . to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forgo—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guarantee of an independent judicial administration for the benefit of the whole people.

O'Donoghue v. U.S., 289 U.S. 516, 533, 53 S.Ct. 740, 744, 77 L.Ed. 1356 (1933). And Judge Irving R. Kaufman of the Second Circuit has pointed out that "one of the grievances against George III listed in the Declaration of Independence had been that: 'He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries! Our Founding Fathers were determined that the judiciary of the new republic would not be so feeble.' "[15]

The reasons behind the existence in our Constitution of these aspects of articles II and III are identical to the interests advanced by Mayor Bradley in support of article II, § 6(b). We do not think a meaningful distinction between state and federal judges can be made in this context. We recognize that section 6(b) applies to school boards and to all local officials, not just to the judiciary, but we believe the state has an equally compelling interest in regulating these offices. Chief Justice Burger has noted: "No simple tradition in public education is more deeply rooted than local control over the operation of schools; local

[15] Address by The Honorable Irving R. Kaufman, United States Court of Appeals for the Second Circuit, *Chilling Judicial Independence*. Thirty-Fourth Annual Benjamin N. Cardozo Lecture, delivered November 1, 1978, to the Association of the Bar of the City of New York.

autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 3125-26, 41 L.Ed.2d 1069 (1974); *see also Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 2770, 53 L.Ed.2d 851 (1977) ("[Local authority in educational matters is a] vital national tradition.") (citations omitted). The other offices covered by section 6(b), offices such as mayor, city council member, county tax assessor, county supervisor, and district attorney, may not have received as much judicial attention as public education, but they belong as squarely within the realm of state as opposed to federal concerns. The state's strong interest in regulating matters of local importance thus serves to make section 6(b) in its entirety a matter of compelling state interest.[16]

VI

We now confront the question of whether the means chosen by California to safeguard this compelling interest are overbroad. As noted above, section 6(b) represents an attempt to make nonpartisanship more than a matter of nomenclature. It expresses the judgment that simply designating an office "nonpartisan" is not sufficient to ensure its political independence, that if those who hold nonpartisan office are to be truly impartial, burdened not by partisan commitments but only by civic responsibility, political parties must be barred from active participation in the nonpartisan electoral process. This judgment is California's judgment, and it is rooted in California's history. We therefore turn to that history in an effort to understand why California has felt it necessary to insulate the process of electing judicial, school, county and city officials from the realm of partisan politics.[17]

---

[16] We note that, nationwide, close to seventy percent of municipal elections are nonpartisan. Cassel, "The Nonpartisan Ballot in the U.S.," in *Electoral Laws and their Political Consequences* 226-27 (A. Grofman ed. 1986).

[17] Even as we feel compelled to assess the history of nonpartisanship in California politics, however, we are mindful of the warning of noted

Before beginning our discussion of the historical impetus for section 6(b), we note that our reliance on history finds support not only in the well-established principles of federalism, but also in the writings of Oliver Wendell Holmes. In his famous passage arguing that experience forms the life of the law, Holmes attests to the importance of considering a law in the context of the historical circumstances that gave rise to it:

> The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

O.W. Holmes, *The Common Law* 1 (1881).

We may trace the roots of nonpartisanship in California to a time when local government, including the judiciary and public school boards, appears to have been dominated by partisan political bodies which were largely under the thumb of aggressive special interests, including the Southern Pacific Railroad.[18] The

---

Constitutional authority Paul Freund: "When [a judge] looks to history for a scaling of values, he is confronted . . . with the problem of differentiating history from the historians: In Yeats' phrase, how to know the dancers from the dance; in Santayana's, looking over a crowd to find one's friends." Rational Decisions: Nomos VII, "Rationality in Judicial Decisions" 114.

[18] See *Unger v. Superior Court, supra,* for a review of the historical background of nonpartisan election laws in California. The development of this tradition is also extensively discussed in Lee, *The Politics of Nonpartisanship* (1960) and J. Owens, E. Costantini & L. Weschler, *California Politics and Parties* 78 (1970).

pernicious activity of the "Octopus," as the Southern Pacific Railroad was often called,[19] has been summarized as follows:

> The political machine fashioned by the Southern Pacific Railroad stands as the most successful, if the most corrupt, political organization in the history of California politics. The political organization created and controlled by California's premier railroad literally ran the state's politics. The railroad, started in 1861 by Theodore D. Judah, Leland Stanford, Collis P. Huntington, Mark Hopkins, and Charles Crocker, was the single most important economic power in the state until the Progressive reforms after 1910. The Big Four, as Stanford, Huntington, Hopkins, and Crocker were known after Judah's death in 1863, entered politics to expand and protect their holdings. Their lobbyists in Washington, D.C. were able to secure a total subsidy for the railroad amounting to $27,855,000 in federal bonds and ten million acres in public lands, thereby making the Southern Pacific the richest business and the largest private landowner in the state. Furthermore, vast sums were wrested from local government and the state in the 1860's, and although such subsidies were ended in 1871, the Southern Pacific Railroad already owned 85 per cent of the state's railways and dominated land transport in California.
>
> Local communities that refused to furnish the subsidies set by the Big Four were threatened with extinction by careful planning of the rail route to bypass them. Crocker, now famous for the art collection that bears his name, was even more famous for threatening the Los Angeles city council if they did not meet his demands; "If this be the spirit with which Los Angeles proposes to deal with the railroad upon which the town's very vitality must depend, I will make grass grow in the streets of your city."

---

[19] The term "Octopus" was coined by novelist Frank Norris in a book so entitled about events at Mussel Slough, the scene of a deadly gunfight that took place in California on May 11, 1880 between local settlers and railroad agents. *See* the Journal of the Ninth Judicial Circuit Historical Society, "Western Legal History," Vol. 1, No. 2, Summer/Fall 1988.

The Southern Pacific had an agent in every town and village to protect its interests. In time, both Los Angeles and San Francisco had resident political machines that were controlled by the railroad. Such machines were common throughout the nation, but the "Octopus," as the railroad was christened by novelist Frank Norris, was notorious in its open display of contempt for public morals and decency. It is not surprising that the Workingmen's party made the Southern Pacific a favorite target. Nor is it surprising to find that both the Democratic and Republican parties finally reacted to such blatant corruption. The federal government, not the state government, however, finally exposed the railroad machine. As a result of information brought out in a court case, Congress formed the Pacific Railway Commission in 1887 to examine federally subsidized railroads. Although Stanford and Crocker refused to cooperate, it became evident that considerable amounts of money were spent to influence federal and state legislation, and that the Southern Pacific dominated California politics through its business agents.

Even with the exposure provided by the federal investigations, state political leaders proved to be ineffectual in dealing with the "Octopus." The task of destroying the Southern Pacific machine fell to a group of political reformers and journalists. Led by John R. Haynes and Edward A. Dickson, an incipient organization was formed to battle the Los Angeles branch of the machine, and soon editors, writers and professional people throughout the state were joining the movement. Despite the efforts of these reformers, the Southern Pacific Railroad faced the twentieth century still the number one force in California politics. Its demise was yet to come.

California's frontier politics had disappeared by 1900. The free and easy style of the early years gave way to a sophisticated and ruthless political machine. It made little difference which party was in power, the railroad still ruled. Politicians either played the game according to Southern Pacific rules or soon found themselves out of office. Obviously the power of the railroad's political machine could be checked only by an

> organization of comparable power. Before the end of World War I, reformers created such an organization; an organization that not only defeated the railroad, but also shaped California's political heritage for many years.

J. Owens, E. Constantini, and L. Weschler, *California Politics and Parties.* 31-32 (1969) [hereinafter Owens].

The "Octopus" was not the only corrupt entity on the California scene. Local political machines were also a major problem:

> The most important of the civic reform movements took place in San Francisco, where muckraking newspapermen joined forces with business and professional groups to battle one of the most ruthless and graft-ridden city machines in the state. The Union Labor party, under the direction of Abraham Ruef, elected its own mayor, captured the police force, ran the franchise board as a private vending operation, and used utilities rates as a means of political payoff. After capturing city hall in 1901, Boss Ruef, through the mayor's office, began a five-year orgy of bribery, blackmail, and extortion. Reformers, thoroughly disgusted with party politics and stymied at the polls, turned to the courts. The ensuing graft prosecution, 1906-1909, provided the opponents of the San Francisco machine with the ammunition they needed to start a statewide campaign against political corruption.

Owens at 32.

The effect of such special interests and partisan groups on elected school boards and judges was of particular concern to the public. Turn-of-the-century history provides insight into the importance for impartial government of depoliticized education and a judiciary removed from political pressures.

In examining the historical development of California's—and indeed the nation's—tradition of depoliticized educational government at the local level, we find a turn-of-the-century history that reveals remarkable similarities to the political miasma for which the Octopuses and the Abe Ruefs of the time were responsible in other related areas. We draw knowledge and insight from R. Freeman Butts, noted historian of American education:

> The bureaucratic modernization of urban schools took several forms, each dependent on the particular political process that developed in different cities.
>
> The early city systems of education had reflected small town and rural arrangements in which a local community elected a school board whose members ran the schools in their spare time. Their duties were to appoint teachers, select textbooks, decide where schools should be located, fix teachers' salaries, and determine how much taxes should be raised. As the city systems grew in size and cities were divided into wards for electing city officials, the wards commonly became the school board districts. When immigrant groups poured into the cities, especially from the 1880s onward, the wards became centers of ethnic concentration so that elected official represented their ethnic constituencies. This had the merit of "keeping the schools close to the people of the local community" so that they could reflect the wishes of the people, but the danger was that the schools could easily become the special province of local political bosses. In fact, they *did* become patronage bases of ward leaders, whose wishes could determine whose daughter was appointed as teacher, or whose brother or cousin would become janitor, or who would be awarded the contract for school buildings, repair, maintenance, and supplies.
>
> The movement toward educational centralization was accelerated by sensational exposures in the press (in the Lincoln Steffens' muckraking genre of the day) of corruption and cronyism in the management of schools by local political bosses. With Jacob Riis and Joseph Mayer Rice leading the way, welfare-progressive reformers of a humanitarian bent were persuaded that the welfare of the children would be served by the "clean government" processes being proposed as other municipal and state reforms. Progressive reformers of an economy/business orientation were persuaded that the solution was to reduce the power of local political bosses by replacing the larger boards with smaller boards composed of more public- spirited citizens who would be elected at large or be appointed. Moreover, political cronyism would be

> eliminated by giving more power to professional administrators, who would establish a civil service type of personnel selection based on the criteria of merit and training, rather than on the kinship or personal relation criteria that evidently prevailed.

R.F. Butts, *Public Education in the United States: From Revolution to Reform* 177-178 (1978).

Writing in 1929, Dean Ellwood P. Cubberley of the Stanford School of Education wrote that "[n]o surer mean for perpetuating the personal and political evils in school control can be devised than the continuation of the ward system of representation." E. Cubberley, *Public School Administration* 175 (1929). Today it is estimated that in excess of seventy percent of "all American school districts provide for pure at-large and nonpartisan election of board members."[20] *See* Note, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution,* 67 Tex.L.Rev. 139, 170 (quoting from H. Zeigler, E. Kehoe & J. Reisman, *City Managers and School Superintendents: Responses to Community Conflict* 11 (1985)).

The tenor of late nineteenth century California regarding the effect of party politics on judges is well chronicled in the debates of California's Constitutional Convention of 1878-79. W.J. Tinnin, representative for the Third Congressional District, remarked:

> I have attended the conventions of the Democratic party, of the Independent party, and the Republican party; and what is the argument advanced therein in regard to judicial positions? Why, A already has the office, and the party owes him no more recompense; his fealty has been paid for; now give it to B, or some one else who has served the party. That argument

[20] For additional reading on the development of school boards in the United States, see Callahan, "The American Board of Education, 1789-1960" in *Understanding School Boards* 19—46 (P.J. Cistone ed. 1975), and Tyack, *The One Best System: A History of American Urban Education* (1974).

> invariably controls the convention, and you will find that those who have held the office are ousted to make room for others. Public clamor has its influence even upon Judges.

Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. 333, 336 (1988) (citation omitted). And Horace C. Rolfe, representative for San Diego and San Bernadino Counties, observed:

> This idea of a justice of a Supreme Court being reelected in consequence of having been a good and efficient judge, is all a delusion. It never has happened in this State, and I do not believe it ever will happen. If a Justice of our Supreme Court is nominated for reelection, and happens to be on a ticket that wins, he is reelected. If he happens to be on the ticket in the minority, he is defeated. I have known some of our best Judges defeated because they were put up by a party that was slightly in the minority.

Id. (citation omitted).

To remedy the problem of party control over judges, three reforms were built over the years into California law. The first—staggered fixed year terms—appeared with California's second Constitution in 1878. The second—the designation of judicial offices as "nonpartisan"—occurred in 1911 as part of Hiram Johnson's package of reforms. The third—the abolition of contested elections for appellate justices in favor of incumbent retention elections—closed another gap in 1934.[21] Each of these measures emanated from a continuing effort to shelter the judiciary from politics with the objective of promoting excellence, integrity, and independence; and each grew out of real problems, not abstract musings of academics.

[21] Dean Uelman reports that the 1934 measure was the product of a statewide "good government" committee made up of civic leaders, veterans' groups, and law enforcement agencies. The committee was headed by District Attorney Earl Warren of Alameda County. Uelman, *California Judicial Retention Elections,* 28 Santa Clara L.Rev. at 339. *See also* Smith, *The California Method of Selecting Judges,* 3 Stan. L.Rev. 571, 579-80 (1951).

Although we have focused on measures aimed at removing school boards and the judiciary from partisan influence, we do not wish to suggest that turn-of-the-century Californians restricted their concern over political corruption to those areas. A more general reform movement had two prongs: one aimed at bringing the activities of partisan politics under control and the other designed to remove altogether certain areas of government from the partisan arena.

In 1916, one faction of victorious "reformers" are reported to have viewed in retrospect the political scene which they set out to clean up as follows:

> Under the provisions of our charter, as it existed prior to 1910, the following objectionable results obtained:
>
> 1. The selection of candidates for offices nominated by party conventions dictated to and controlled by political bosses.
>
> 2. A partisan rather than an efficient administration of municipal affairs.
>
> 3. The election to offices, by a minority vote, of candidates who did not represent the choice of a majority of the voters.
>
> It was for the correction of these evils that the charter was amended in 1910, and the present system of double election enacted. That the evils complained of were real and the need of correction imperative was at the time generally conceded, and is still conceded by all who have the welfare of the city at heart. The old municipal nominating conventions, like the county and state conventions, with their boss-chosen and boss-controlled delegates, had become intolerable; while partisan government based upon a so-called party responsibility was demonstrated to be but another name for boss rule applied to the administration of the office itself.
>
> The present system has effectually swept these two evils for all time into the political scrap basket, and this accomplishment must be accredited to it as a positive virtue.

Jordan, "Municipal Elections," XI Transaction of the Commonwealth Club of California 173, 179 (August 1916). This passage represents not a fanciful prediction of what would happen if partisan politics become involved in municipal government, but a vivid description of an actual unsatisfactory situation which, in the judgment of its author, had just been remedied.[22]

The reforms that characterized the Progressive Era were accompanied by a positive theory of local government. This theory viewed city government as largely a matter of municipal housekeeping and emphasized such objectives as clean streets, good schools, honest courts, efficient sewers, fair property taxes, potable water, and responsive police departments. Lee, *The Politics of Nonpartisanship* 28-29 (1960) (citation omitted). These objectives were not perceived to be political, and it was widely believed that "City government must, to be efficient, be emancipated from the tyranny of the national and state political parties." *Id.* at 29 (quoting Goodnow, *National Municipal League, A Municipal Program* 144-145 (1900). Lee concludes his description of the philosophy behind the nonpartisan system with a quote from Robert Wood:

> Finally, and most fundamentally, no-party politics implies some positive assumptions about political behavior that go beyond simple antagonism to partisanship. Inescapably, there is a belief that the individual can and should arrive at his political convictions untutored and unled; and expectation that in the final process of election and decision making a concensus will emerge through the process of right reason and by the higher call to the common good . . . the citizen, on his own, knows best. . . .
>
> As a theory, nonpartisanship harks back to the traditional concept of local government, to Jefferson's high expectations for the rational capacity of the yeoman, and to that strand in

---

[22] For additional insight into political corruption in American cities during this period, *see* L. Steffens. *The Shame of the Cities* (1904), M. Seasongood, *Local Government in the United States* (1934), and W. Bean, *Boss Ruef's San Francisco* (1952).

American political reasoning that relies on unfettered individualism.

Id. at 34 (quoting Wood, *Suburbia: Its People and their Politics* 157). This Jeffersonian ideal, with its stress on "the rational capacity of the yeoman" and unfettered individualism, is the very antithesis of the kind of paternalism condemned in *Eu*, 109 S.Ct. at 1020.

History thus reveals the practical and philosophical basis for California's judgment that permitting party organizations to become actively involved in "nonpartisan" elections would erode the concept of political independence on which such elections are based. Appellees suggest that, because the rampant and overt corruption that characterized turn-of-the-century political parties in California has abated, history is irrelevant. While the abuses we have described may no longer be as widespread,[23] this improvement may have been occasioned in part by removing the spoils from the grasp of the greedy—as the framers of our Constitution did with respect to the federal judiciary. We recall George Santayana's admonition: "Those who cannot remember the past are condemned to repeat it." Santayana, 1 *The Life of Reason* 2284 (1905). Guided by Santayana, we see the positive political climate produced by the reform movement not as something that makes history irrelevant, but instead as attesting to the sagacity of the reformers' impulse to restrict the activities of party organiza

[23] The potential for control of public officials by political parties or major economic interests is by no means an exclusively historical phenomenon. On the first page of the March 7, 1989 edition of the *Wall Street Journal*, the nation's top savings and loan regulator for the government in 1983 describes himself as the hand-picked "patsy" of the U.S. League of Savings Institutions. Jackson, *Waning Power*, Wall. St.J., Mar. 7, 1989, at 1, col. 6. As he discusses the current crisis in the savings and loan industry, the "patsy" says, "I was to do what [the U.S. League] wanted." *Id.* The article goes on to describe millions of dollars in political contributions to federal candidates, including large interest-free loans to the inaugural funds of the last three Presidents of the United States, prompting Congressman Henry Gonzales of Texas to say, "Everything the industry has wanted, Congress has rolled over and given it to them." *Id.*

tions in municipal, judicial, and school board elections. The durability and efficacy of a solution should not be used as a reason to ignore its raison d'etre. It is possible to debate the merits of the reforms of the Progressive Era, but it is not possible to deny the existence of the real and serious predicaments which they were designed to alleviate.[24] The concreteness of California's justifications for section 6(b) stands in favorable contrast to the lack of empirical evidence in *Munro v. Socialist Workers Party*, where the Court endorsed Washington's claim that restrictive ballot qualification laws were necessary for political stability despite the absence of proof of actual voter confusion, ballot overcrowding or the presence of frivolous candidacies. *See* 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986).

Our discussion of the reform movement and the circumstances that gave rise to it thus leads us to the conclusion that California is warranted in believing that stronger measures than a "nonpartisan" label are necessary to ensure the political independence of the office to which the label attaches. Contrary to plaintiffs-appellees' claims that the passage of Proposition 49 "brought a *radical* change in the laws governing California's elections . . . ," section 6(b) is simply the most recent example of a conscious effort to make nonpartisanship a fact.[25] Plaintiffs-appellees' asser-

[24] With all due respect, Judge Canby's dissent suffers from the defect inherent in trying to identify or to classify an object by examining one of its fundamental characteristics without giving due consideration to others. There are important facets to Section 6(b) other than its First Amendment implications. The First Amendment is not absolute. It is for this reason that we use a balancing rather than a litmus test.

[25] California's consistent impulse to restrict the corrupting potential of party control over public officials has been described as follows:

> California is so large, its population so varied and mobile, and its society so diverse that it is difficult to generalize about the state's politics. Nevertheless, a certain recurring theme or leitmotif runs through that politics, an understanding of which brings some order to what otherwise appears senseless and unpredictable. The theme is perhaps best characterized by the term *antipartyism*. Primarily a legacy of the Progressive era of a half-century ago, antipartisym has been largely responsible for California's distinctive political character.

tion that some political party central committees in some parts of the state—but not others—have a history of encroaching on nonpartisan turf does not impeach this view. It only explains why Proposition 49 came to pass. It appears from the record that the passage of Proposition 49 was the people's way of reaffirming their strong commitment to the political independence of the judiciary, school boards, city and county government.

The question we now face is whether California is justified in taking this most recent step to safeguard the political independence of those who hold nonpartisan offices. To use the prescribed terms, we must determine whether section 6(b) is narrowly tailored to promote its intended aim of impartial administration of government. Although we perform this "least drastic means" analysis, we share Justice Blackman's discomfort with its utility:

> And, for me, "less drastic means" is a slippery slope. . . . A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 at 188, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (Blackmun, J., concurring); *see also Eu,* 109 S.Ct. at 1026 (Stevens, J., concurring); *Stevenson v. State Board of Elections,* 794 F.2d 1176, 1180 (7th Cir.1986) "It is not helpful to ponder what is 'less restrictive' without thinking about the functions the rules serve and how these functions would be affected by 'less restrictive alternatives.' *Every* alternative is more restrictive than some other one." (Easterbrook, J., concurring) (emphasis in original). Moreover, we share Judge Easterbrook's view that a "state need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Id. See also Storer,* 415 U.S. at 736, 94 S.Ct. at 1282 (" . . . the Constitution does not require the states to choose ineffectual means to achieve its aims.").

> In general, it involves a distrust of politics and the politician, a fear of strong political parties, and a conviction that political independence is a virtue.

Owens at 2.

Having issued this caveat, we now proceed to assess whether California is justified in perceiving partisan endorsements of candidates in nonpartisan elections to be incompatible with the political independence nonpartisanship seeks to preserve. History, the record in this case, and common sense lead us to share that perception. We believe the constitutional validity of the nonpartisan concept of government itself to be at stake here. For us to hold that a political party has a protected constitutional right to endorse, support, or oppose a candidate for nonpartisan office would be to ring down the curtain on state, local, and municipal nonpartisanship. We thus reject the notion, as did the California legislature and the people of California, that California's basic laws prohibiting political parties from nominating favored candidates for nonpartisan offices and providing for nonpartisan ballots are sufficient in themselves to protect California's brand of nonpartisanship.[26]

Unquestionably, with the demise of article II, § 6(b), political parties would establish regular and formal procedures pursuant to which candidates for nonpartisan offices could solicit endorsement and support and positions on "slate mailers," procedures whereby candidates and their views and qualifications could be—and most likely would be—questions and examined. It is extremely doubtful that such decisions to endorse or not to endorse would be ad hoc or arbitrary and capricious. Although it is difficult to predict the precise form in which these processes would appear, it is naive to believe that they would not. It is equally naive, we think, to believe that parties would rise above the temptation to support and endorse nonpartisan candidates with views incompatible with those of the party, many of which would be largely irrelevant to local government. On the other side of this coin, nonpartisan candidates would feel pressure to adopt views believed to be acceptable to the party whose money, machinery, and clout they sought to obtain. The substance of the nonpartisan process which California seeks to protect could easily be swept away by the political wind from which it is designed to be sheltered. We

---

[26] We reject plaintiffs-appellees' attempt to create a distinction between nomination and endorsement. Such a distinction strikes us as facile, and it ignores the substance of the issues at stake.

underscore once again that plaintiffs-appellees seek in this lawsuit, among other things, the right to place official political party and party central committee endorsements of nonpartisan candidates in the San Francisco voter pamphlet, an official government document that goes to each registered voter shortly before such election. This, in our view, would undercut the statutory prohibition against party nominations for nonpartisan offices to the point of rendering it useless.

We are persuaded both by history and the logic advanced by defendants-appellees and the *amici* that party endorsements would place local officials and judges in debt to the statutory political parties and that through the endorsement and support process, the political parties would indeed be able to close the door to elective office to independent-minded persons who refuse to toe the party line. It is likely that any process by which a major political party would decide whom to endorse—or support—would effectively determine who could and who could not run for that office. This is incompatible with California's rule that neither a party nor its central committee may nominate a candidate for nonpartisan office; and it is certainly the very essence of what nonpartisanship is designed to avoid.

We thus believe California to be justified in adhering to a bright-line approach to protecting its compelling interest. The First Amendment does not compel California to expand the vast and imposing array of intricate controls and restrictions on political activity already on the books in that state. Furthermore, we do not deem it prudent for the Federal Judiciary to conclude without the benefit of the legislative process that "California can adequately safeguard such [nonpartisan] interests . . . by other means."[27] We do not see that the "least restrictive means" test

[27] The policy choices in this area are complex and difficult. Not surprisingly, the experts do not agree either on what works or what is best. To illustrate this point, we turn again to R.F. Butts:

> But the questions about historical judgment are exceedingly difficult to answer. No simplistic amount of historical praise or blame of the Progressive era will do. Nagging questions persist. Was the loss of community control too high a price to pay for reducing corruption?

requires California to find the thinnest possible ice on which to skate or to search for a different pond. Insofar as the judiciary is concerned, California's approach is certainly a method of creating independence that is far less drastic than the method adopted by the Constitution of the United States. Federal judges have been removed altogether from the political fray. We suppose California could have originally adopted the same approach to selecting state judges to sit on the bench, investing them with life tenure and compensation protection.[28] Having chosen instead to require them to stand periodically for election or retention by the people, it seems reasonable to take measures to avoid control over their fate by political parties. Article II, § 6(b) accordingly strikes us as no more "paternalistic" than the federal approach to insuring the independence of the federal judiciary, and it is no more "paternal-

> Was the rise of professionalized expert management too high a price to pay for solving the problem of how to provide mass education to a whole population and for improving the quality of teaching through merit appointment and greater efficiency? Could corruption and inefficiency have been reduced without bureaucratization? Could diverse ethnic values have been brought into the process more constructively while at the same time improving the educative process? When settlement workers and teachers alike gave lessons in cleanliness and bathing to dirty immigrant children, were they simply imposing alien middle-class values on the working-class poor, or were they trying to improve the social and educational level of the impoverished prisoners of the urban ghetto?
>
> These questions can certainly be debated, but the fact remains that the centralizing of school organization and professionalizing of school administration did sweep the country as a result of the political processes of the Progressive era.

R.F. Butts, *Public Education in the United States: From Revolution to Reform* 179.

[28] *See Sailors v. Kent Board of Education*, 387 U.S. 105, 108, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967) ("We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.")

istic" than the concept of a representative form of government as compared to a true democracy.[29]

Moreover, when examined in context, section 6(b) *is* narrowly drawn. It is limited in its coverage only to those concentrations of power that pose the greatest threat to the objectives of nonpartisanism. All other groups, individuals, and associations are free to do as they please. This protects the free expression and interchange of ideas that the First Amendment is designed to promote. We respectfully disagree that the statute is defective because it fails to include *all* groups or associations that may have an interest in nonpartisan elections. This is a strength of article II, § 6(b), not a fatal defect.

In addition, article II, § 6 (b) is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this "indirect consequence." As such, it compares favorably with the statute at issue in *Eu,* 109 S.Ct. at 1016. It is a marginal and workable restriction on speech incident to a set of election rules designed to promote independence in public office.

Thus, section 6(b) is not the kind of substantial limitation or draconian restriction on free political exchange that rises to the level of incompatibility with the Constitution. With well-established principles of federalism embodied in the Tenth Amendment in mind,[30] we are loathe to order California to turn its back

---

[29] It has been argued that article IV, section 4 of the Constitution provides a textual basis for according considerable deference to the choices of the states regarding their political structures, etc. . . . We find the argument appealing but we do not use it as a basis for our decision. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1 (1988). *See also Lance v. Plummer*, 384 U.S. 929, 86 S.Ct. 1380, 16 L.Ed.2d 532 (1966) (Black, J., joined by Harlan, J., dissenting).

[30] *See* The Federalist No. 45:

> "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised as external objects, as war, peace, negotiation, and foreign commerce. . . . . The powers reserved to the several states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."

cited in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 570, 105 S.Ct. 1005, 1027, 83 L.Ed.2d 1016 (Powell, J., dissenting).

on one hundred years of experience and to jettison a system that gives every appearance of serving its people quite handsomely.[31] California's elected legislators—all of whom are partisan politicians—must have agreed with this analysis or they would not have passed A.C.A. 7 which placed Proposition 49 on the ballot.[32]

---

[31] Justice Holmes put it well in 1922 when he said, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 9-10, 67 L.Ed 107 (1922).

[32] Indeed, in arguing for Proposition 49, Assemblyman Mountjoy stated:

> Unless we specifically amend our State Constitution, political parties will dominate our historically nonpartisan judicial, county, and local election. Proposition 49 will reestablish the principle of nonpartisanism.
>
> The greatest danger in injecting political parties into the local elective process will be a not-so-subtle creation of a patronage network. The power of the state party leaders will no doubt increase greatly, opening the door for a centralized partisan power authority of incredible financial dimensions. In many Mid-western and Eastern states, the city, state, and county jobs are brokered by the political central committees. Could this happen in California?
>
> The opportunity will be there (without enactment of Proposition 49), and the temptation will be too great to resist. The financial and political force of state political parties can be directed toward local 46 and judicial elections.
>
> The distinctive quality of the California political process has been the independence of the California voter. To a great extent, Section 6 of Article II of our State Constitution has created that independence and kept the partisan fox out of the local elective hen house.

Statement of Richard L. Mountjoy as to Background and Purpose of Proposition 49, 1985 (on file in Assemblyman Mountjoy's office).

EQUAL PROTECTION

Plaintiffs-appellees also contend that article II, § 6(b) violates the Equal Protection Clause of the Fourteenth Amendment. To support this contention, they point out that section 6(b)'s provisions cover only political parties but not other potential endorsers and supporters—including numerous "unofficial" partisan organizations and special interest groups with a stake in nonpartisan offices and candidates. Because plaintiffs-appellees' claim concerns an abridgement of a fundamental constitutional right, the First Amendment, we are required to subject section 6(b) to strict scrutiny. "[A]ny classification which serves to penalize the exercise of . . . [a constitutional] right, unless shown to be necessary to promote a *compelling* government interest, is unconstitutional." *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). *See also Dunn v. Blumstein*, 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972).

Our analysis of plaintiffs-appellees First Amendment challenge disposes—somewhat anticlimatically—of plaintiffs-appellees' equal protection contention. For all the reasons previously articulated in this opinion, we hold that article II, § 6(b) is necessary to defend adequately the nonpartisan objectives it was designed to shield. To strike down this part of California's constitution on the diaphanous assumption that there might be a less drastic method of achieving California's objectives would be to ignore the wisdom in the adage that the unintended consequences of an action are frequently far greater than that which was set out to be accomplished.

CONCLUSION

Article II, § 6(b) may be characterized as a law preventing the disruption of the nonpartisan political sector from without in order to permit the selection of candidates in that sector to take place in accordance with nonpartisan principles. We endorse this characterization of section 6(b), and in so doing we hold that it is a means as narrowly tailored as consistent with promoting the compelling state interest of impartially administered government.

REVERSED and REMANDED for further proceedings consistent with this Opinion.

SNEED, Circuit Judge, concurring separately:

I concur in Judge Trott's opinion.

I write only to comment on Judge Canby's discussion of Federalist No. 45. *See infra* at 1086 n.3.

It has become fashionable to reject arguments based on principles of federalism rooted in the Tenth Amendment by referring to the Fourteenth Amendment. Presumably the reference is to that portion of the first section of the Amendment containing the Due Process and Equal Protection Clauses as augmented by certain of the Bill of Rights. Perhaps I have missed something, but it is a fact that I have never read of the subject of nonpartisan elections being discussed by Congress in 1866 when it debated and passed the Fourteenth Amendment. More to the point, the context of these clauses has never been constant. That is not a criticism, only a statement reflecting the life of the law, yes, even constitutional law. Incorporation of portions of the Bill of Rights, for example, is a fairly recent development that perhaps may be, or already has been, extended to the Ninth Amendment. The content of the incorporated Bill of Rights also evolves over time.

In truth, when we, circuit judges, rely on the Fourteenth Amendment to curb the powers of a state, we are only relying on our perception of what the Supreme Court presently believes the Amendment requires. Judge Trott and I share a perception; Judge Canby has another. None of us has access to any stone tablets; yes, not even the Supreme Court.

CANBY, Circuit Judge, dissenting:

Judge Trott has written well, but there is a fatal infirmity in all of the reasoning that supports California's constitutional provision. California justifies its suppression of political party endorsements because the voters, if given such information, might choose to act upon it and cause political results that the State regards as untoward. That is precisely the kind of political paternalism that conflicts fundamentally with the first amendment. *See Eu v. San*

Francisco County Democratic Central Committee, ___ U.S. ___, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989).

Every single evil that the State seeks to avoid flows from electoral choice. One need only look at the majority opinion's dire prediction of the results that would follow from striking down California's ban on party endorsements.

> Unquestionably, with the demise of Article II, § 6(b), political parties would establish regular and formal procedures pursuant to which candidates for nonpartisan offices could solicit endorsement and support and position on "slate mailers," procedures whereby candidates and their views and qualifications could be—and most likely would be—questioned and examined. . . . It is . . . naive, we think, to believe that parties would rise above the temptation to support and endorse nonpartisan candidates with views incompatible with those of the party. . . . On the other side of this coin, nonpartisan candidates would feel pressure to adopt views believed to be acceptable to the party whose money, machinery and clout they sought to obtain. The substance of the nonpartisan process which California seeks to protect could easily be swept away by the political wind from which it is designed to be sheltered.

Majority opinion, supra at 1079. Of course, none of these events will come to pass if the voters pay no attention to major party endorsements. The key to all of the above developments is that *many voters attach meaning to a political party endorsement* and vote accordingly. Indeed, if the process described above in fact ensues, the voters will be quite correct. Parties will endorse candidates who adhere to the parties' principles, the candidates will seek to embrace those principles, and the voter will then know that the endorsement means something. *See Tashjian v. Republic Party of Connecticut*, 479 U.S. 208, 220, 107 S.Ct. 544, 551-52, 93 L.Ed.2d 514 (1986).

Other evils envisaged by the majority 1079 "that party endorsements would place local officials and judges in debt to the statutory political parties," and that party endorsement "would effectively determine who could and who could not run for that

office"—are similarly dependent upon the voters' positive reaction to the political endorsement.

To accept California's position, then, is to accept the proposition that the voters, in acting favorably upon a political party endorsement, are *making a mistake*. They are attaching too much meaning, or the wrong meaning, to the party's endorsement. Knowing that a particular party supports a candidate, the voters improperly vote for that candidate and give rise to too much party influence over local affairs. To combat this tendency, California could rely on independent candidates to try to convince the voters that they ought not to attach such importance to party labels. But California is apparently afraid that a majority of the voters will fail to be convinced. Consequently, it has taken a much simpler route: it has prohibited statutory political parties from endorsing (or otherwise supporting) candidates in nonpartisan elections, and from publicizing such endorsements. Under our Constitution, however, that option is not open to California. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976); *see also Anderson v. Celebrezze*, 460 U.S. 780, 798, 103 S.Ct. 1564, 1574- 75, 75 L.Ed.2d 547 (1983).

Much of the majority's opinion is taken up with explanations of the beneficial effects of nonpartisan elections and an appeal to pragmatism. Good things, we are told, have followed from nonpartisan elections—good things that would not have come about if the voters were exposed to one particular vein of political speech. We are presented with Holmes' statement that experience, not logic, has been the life of the law. There are several difficulties with this line of attack.

There are times when the law should accommodate to an existing condition and there are others when the status quo must yield to principle. The first amendment is perhaps our most fundamental assertion of principle, in a document that embodies the loftiest of norms along with the most pragmatic of compromises. Properly viewed, the first amendment protects free

expression as an end in itself. *See* L. Tribe, *American Constitutional Law* 576-79 (1978). But even under a narrower, instrumental view of the first amendment, there is an irreducible core requirement. It is that political speech must be free so that the sovereign people can decide public issues. To posit that the people may decide incorrectly, and therefore should be denied information in order to steer their decisions, is to posit some other sovereign who can decide when the people are likely to be mistaken, and what they should be allowed to know. Little would be left of the first amendment under such a regime. If we are to draw a principle from Holmes, then, it should be "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion). *See also Gitlow v. New York*, 268 U.S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way").

That California is suppressing expression because of its communicative impact is enough to invalidate its action in the absence of such an imminent danger "that an immediate check is required to save the county." *Abrams*, 250 U.S. at 630, 40 S.Ct. at 22 (dissenting opinion); *see* Tribe, *supra* at 581. None of the political evils described in the majority opinion rise to that level. Indeed, it is not even clear that the evils, which are themselves well documented, were caused by political party endorsements or were cured by their suppression. I am not convinced, for example, that the influence of the Southern Pacific Railway in California politics would have been noticeably diminished if the local governments with which the railroad dealt had been elected without partisan support. Nor, I suggest, would it have been constitutional for California to solve the problem of Southern Pacific dominance by prohibiting the Railway from announcing its support for particular political candidates. *See Buckley v. Valeo*, 424 U.S. 1, 39, 96 S.Ct. 612, 644, 46 L.Ed.2d 659 (1976). Why should it be able so to restrict political parties?

Indeed, two themes seem to run throughout the majority's review of California political history: first, that California voters have a strong tradition of anti-party independence and, second, that if candidates are endorsed by political parties, the California voters will overwhelmingly vote for party candidates to the exclusion of independents. Putting the anomaly aside, the majority opinion would favor the first tendency by permitting California to prohibit the second. Underlying that choice, of course, is the conclusion that nonpartisan candidates make "better" local officials than partisan ones do.[1] That proposition is not self-evident, nor is the proposition that the interests of national political parties are irrelevant to local issues. There may be no Republican, or Democratic, or Libertarian way to build a city jail, but there may very well be Republican, Democratic or Libertarian positions on whether a jail should be built and who should be taxed for it. It is not necessarily bad government for voters to elect an official because of his partisan position on such an issue, nor for the official to feel committed to the position that got him elected. *See Brown v. Hartlage*, 456 U.S. 45, 58, 102 S.Ct. 1523, 1531, 71 L.Ed.2d 732 (1982). In any event, there is no need to decree the superiority of either the partisan or the nonpartisan local official; the voters can make that decision at each election.

Because the majority opinion is insufficiently sensitive to the point that a state may not suppress communication because of its communicative impact, it falls into other error. For example, it concludes that California's constitutional provision "is not a law *aimed* at ideas themselves or specific information that California wishes to suppress although concededly it has this 'indirect

---

[1] This assumption that nonpartisan candidates are "better" seems to underlie the conclusion of the majority opinion, *supra* at 1065, that California's prohibition of endorsements is to be treated sympathetically because it "opens" the political process to diverse interests, rather than clogging it. A diversity of viewpoints in a legislative body may or may not be a good thing, but it is not clearly beneficial or consistent with the first amendment to suppress expression in order to bring it about. To open a system by favoring independents is to close it for the disfavored partisan candidates. Which should be elected should be left to the voters, once they are permitted to know one from the other.

consequence.' " *Supra* at 1081. California's provision, however, forbids parties to "endorse, support, or oppose a candidate for nonpartisan office." The whole thrust of the majority's opinion is that a party endorsement conveys information that the state does not want to go to the voters, because they will act upon it. Article II, § 6(b) is intended to suppress that information. It is quite backward to characterize California's law as one directed at corruption and other political evils, with an indirect effect upon speech. The State's measure is directed at the content of speech, in order indirectly to achieve political consequences. That is its prime flaw.

It is also a mistake to equate political endorsement with control of the nomination process. *Supra* at 1079 n. 26. If the two are equivalent, it is only because of the effect of the endorsement on the minds of the voters. If that forbidden consideration is removed, the two categories are quite distinct. Nothing in the first amendment prevents California from establishing an open nomination totally apart from party direction. Access to the ballot can be achieved by collection of signatures, or by some other neutral method. Such a system will permit California to achieve all the virtues it has attributed to nonpartisan office holding, if the voters agree with its goal.

The fact that California's prohibition is aimed only at statutory parties and their central committees is hardly a saving grace. Those entities, as well as their members, enjoy rights of free speech and free association. *Eu,* 109 S.Ct. at 1020. Nor is much to be gained by the majority opinion's emphasis on the fact that the parties seek to place their endorsements in the San Francisco voter pamphlet, an official governmental publication. San Francisco has chosen to open its voters' pamphlet to endorsement by other groups; it denies access only to the statutory parties and their central committees, as the California constitutional provision dictates. The first amendment does not require San Francisco to distribute any endorsements at all, but that is not the issue in this case. The issue is whether California can prohibit party endorsements, and their distribution. For reasons already stated, the clear answer is "no," and the answer is certainly made no less

clear by the fact that California singles out political parties and permits endorsement by all others.[2]

Finally, a word about judges. It is true that the evils of partisanship appear to be greater in the case of judges than of other officials, because it is far from clear that decisions of judges ought to be responsive to the desires of the electorate, partisan or otherwise. "It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements v. Fashing,* 457 U.S. 957, 968, 102 S.Ct. 2836, 2846, 73 L.Ed.2d 508 (1982). The political threat to judicial independence, however, is attributable far more to the decision to elect judges in the first place, and to subject them to reelection, than it is to party endorsement. Having made that choice, the state is not free to prevent political parties or anyone else from announcing their support of a candidate; the first amendment does not permit the suppression of such information. Although the state interest is higher in the case of judges than of legislators, because of the difference in their functions, suppression of speech is too high a price to pay to advance that interest. *See Unger v. Superior Court,* 37 Cal.3d 612, 622-24, 209 Cal.Rptr. 474, 481-82, 692 P.2d 238, 244-45 (1984) (Grodin, Acting C.J., concurring). Other electoral devices, such as unopposed elections on the question of retention, long terms, or appointment are better constitutional routes to judicial independence.

Conclusion

The decision of the majority in this case permits California to suppress political expression because the voters might misuse the information. Our entire first amendment jurisprudence is to the contrary.

---

[2] My view of the first amendment issues in this case makes it unnecessary for me to reach the question of equal protection, where the California provision is equally suspect.

Most recently, in *Eu,* the Supreme Court struck down California's ban on pre-primary endorsements by political parties. The Court stated:

> California's ban on primary endorsements . . . prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about candidates and the campaign issues.

Eu, 109 S.Ct. at 1020. The Court then firmly rejected California's paternalistic approach despite the reasons, including the danger of voter "confusion," offered in support of the prohibition. *Id.* at 1020-23.

The reasoning and result in *Eu* transfer easily to this case. The first amendment prevents California from suppressing information that its voters might use. The district court understood that point and stuck California's provision down. I would affirm its ruling.[3]

---

[3] The view of federalism cited by the majority opinion and drawn from Federalist No. 45, supra, at n. 28, need not deter us from invalidating the California constitutional provision. The notion that federal concerns are directed toward external affairs, while the tenth amendment reserves to the states the concerns over liberties of the people, was advanced at a time when the Bill of Rights did not apply to the states. The division of powers Federalist No. 45 envisaged was radically altered by the fourteenth amendment, enacted in the aftermath of the Civil War. "We must consider what this country has become in deciding what [The Tenth] Amendment has reserved." *Missouri v. Holland,* 252 U.S. 416, 434, 40 S.Ct. 382, 383-384. 64 L.Ed. 641 (1920). Nothing in our federalism as it exists today suggests that States should be the sole judges of the degree to which first amendment expression can be restricted.

Appendix C

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; and Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants-Appellants.

No. 88-2875.

United States Court of Appeals,
Ninth Circuit.

Feb. 6, 1990.

Before GOODWIN, Chief Judge, and BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ and RYMER, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

Appendix D

Bob GEARY, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner and Sudi Trippet, Plaintiffs,

v.

Louise RENNE, San Francisco City Attorney; Dianne Feinstein, San Francisco Mayor; Board of Supervisors, City and County of San Francisco; City and County of San Francisco, and Jay Patterson, San Francisco Registrar of Voters, Defendants.

No. C 87 4724 AJZ.

United States District Court,
N.D. California.

April 27, 1988.

ORDER PARTIALLY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

ZIRPOLI, District Judge.

Plaintiffs in this case are 10 registered voters of the City and County of San Francisco, and organization of registered voters of said city, and an officer of said organization. Plaintiffs Bob Geary, Robert Silvestri, Dennis Mark, Max Woods, and Terence Faulkner are all members of Democratic or Republican county central committees. Plaintiff Faulkner is Chairman of the San Francisco Republican County Central Committee.

Defendants herein are the City and County of San Francisco, and some officials of said city and county, including the registrar of voters.

In their Third Cause of Action, plaintiffs challenge the constitutionality of California Constitution, Article II, Section 6(b), which prohibits political parties, and their central committees, from endorsing, supporting, or opposing candidates in local, school, and judicial elections. Plaintiffs claim—and defendants admit—that defendants refuse to permit political party and politi-

cal party central committee endorsements of candidates for such offices to be printed in the San Francisco voter's pamphlet on account of said state constitutional provision. Plaintiffs contend that the challenged state constitutional provision abridges their rights under the First and Fourteenth Amendments to the United States Constitution, as well as under 42 U.S.C. section 1983, and have moved for summary judgment on such claims.

Said summary judgment motion has been fully briefed and argued by the parties. Having carefully reviewed the record in this matter, the Court finds that no genuine issue exists as to any material fact with respect to plaintiffs' Third Cause of Action, and that plaintiffs are entitled to judgment as a matter of law.

In reaching this conclusion, the Court considers the concurring opinion of Justice Grodin in *Unger v. Superior Court* (1984) 37 Cal.3d 612, 620-625, 209 Cal.Rptr. 474, 692 P.2d 238, to be highly persuasive. In *Unger*, the California Supreme Court was asked to determine whether the language of California Constitution, Article II, Section 6, barred political party endorsements in judicial races prior to a 1986 amendment to said state constitutional provision which added an express endorsement ban. A majority of the California court ruled that the pre-1986 version of the state constitutional provision did not ban such endorsements. In his concurring decision, Justice Grodin opined that such an endorsement ban would violate the First and Fourteenth Amendments to the United States Constitution:

> Under real parties in interest' interpretation, article II would flatly prohibit a qualified political party from expressing any views concerning a judicial candidate's qualifications, competence, or record. The tension between such an absolute prior restraint on pure political speech and traditional First Amendment principles is obvious and palpable.
>
> There can be no doubt that such a prohibition strikes at the heart of the First Amendment. As the United States Supreme Court stated in *Buckley v. Valeo* (1976) 424 U.S. 1 [96 S.Ct. 612, 46 L.Ed.2d 659] . . .: "Although First Amendment protections are not confined to the 'exposition of ideas,' 'there is practically universal agreement that a major purpose of that

Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussion of candidates. . . . This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot v. Roy* [(1971) 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35] . . . 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " (Id. [424 U.S.] at pp. 14-15 [96 S.Ct. at 632]

Nor can there be any doubt that the First Amendment protects political association, including association through political parties . . . and that '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." . . .

> Because article II, if interpreted as real parties in interest urge, would absolutely prohibit the expression of any opinion by or through a political party concerning candidates for certain public offices, it could be upheld only if the government can demonstrate that the provision furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgement of First Amendment rights. . . . No such demonstration exists on this record.

Id., at pp. 621-622, 209 Cal.Rptr. 474, 692 P.2d 238, footnotes omitted.

The Court agrees with the reasoning of Justice Grodin. While the State of California may have a legitimate interest in maintaining the nonpartisan character of local, judicial, and school elections, Article II, Section 6(b) of the California Constitution is not a narrowly drafted enactment designed to advance such interest by the least drastic means. On the contrary, California can adequately safeguard such interests by providing for nonpartisan methods of nomination of candidates for such offices and by

controlling partisan activities of the candidates—for example, by prohibiting candidates for such offices from soliciting or collecting campaign funds from political parties. Indeed, it appears that California has already taken steps in this direction by adopting nonpartisan nomination methods for all local, school, and judicial offices. See e.g. Cal.Elec.Code Secs. 6400 et seq., 22600 et seq., and 23500 et seq.; Cal Const., Art. VI. Sec. 16; San Francisco Charter Secs. 9.100-1 and 9.104.

Furthermore, defendants have not made any showing why California has a compelling interest in supressing endorsements or discussion of candidates for local, school and judicial offices, by political parties and their central committees, but permitting such advocacy and endorsements by other groups, including partisan organizations and special interest groups. The Court agrees with Justice Grodin that: "The fundamental difficulty with [defendants'] position is that essentially the same arguments . . . can be made with respect to endorsements by other groups—unofficial political parties or partisan organizations, as well as special interest groups—who would remain free to express their views and to vigorously support or oppose any candidate for [local, school, or] judicial office. The possibility that a judge [or local or school official] will appear beholden to particular interests, and the possibility that the public will be unduly influenced by a particular endorsement, are both risks inherent in a system which call upon judges [and local and school officials] to run for office. It does not appear, at least from this record, that partisan endorsements pose such a substantial and unique threat as to justify the limitations upon freedom of expression posed by [Cal. Const., Art. II, Sec. 6(b)]. *Unger, supra,* 37 Cal.3d at p. 624, 209 Cal.Rptr. 474, 692 P.2d 238 (con. opn. of Grodin, J.), footnotes omitted.

GOOD CAUSE APPEARING THEREFOR and for the reasons stated by the court in this order,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment as to the THIRD CAUSE OF ACTION is granted, and that:

(a) California Constitution, Article II, Section 6(b) is hereby declare violative of the First and Fourteenth Amendments to the United States Constitution, as well as of 42 U.S.C. section 1983.

(b) Defendants and their officers, agents, servants, employees, and attorneys and other persons acting in concert or participation with defendants are hereby permanently restrained and enjoined from enforcing or seeking to enforce California Constitution, Article II, Section 6(b);

IT IS HEREBY FURTHER ORDERED that pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court hereby expressly determines that there is no just reason for delay of entry of a final appealable judgment for plaintiffs as to the THIRD CAUSE OF ACTION, and hereby expressly directs the Clerk of the Court to enter this forthwith as a final judgment for plaintiffs as to the THIRD CAUSE OF ACTION.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 90-769

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LOUISE H. RENNE, et al.,

Petitioners

vs.

BOB GEARY, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARLO HALE SMITH

66 San Fernando Way
San Francisco, CA 94127
(415) 564-6091

Attorney for Respondents
Bob Geary, Robert Silvestri,
Dennis Mark, Melissa Gundrun,
Wayne Johnson, David Soule,
Max Woods, Peter Johnson,
Robert Gebert and Election
Action

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
INTRODUCTION AND SUMMARY OF ARGUMENT		1
REASONS FOR DENYING THE WRIT		3
I.	THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH UNANIMOUS AUTHORITY INVALIDATING BANS ON PARTY ENDORSEMENTS	3
II.	NO HISTORICAL OR OTHER EVIDENCE EXISTS IN THIS CASE TO SUPPORT ANY ARGUMENT THAT THE CHALLENGED ENDORSEMENT BAN IS NECESSARY TO SUPPORT ANY COMPELLING STATE INTEREST	4
III.	THE ENDORSEMENT BAN CANNOT BE DEFENDED AS A MEASURE RELATING TO THE "STRUCTURE" OF LOCAL GOVERNMENT	7
IV.	THE RIGHT OF POLITICAL PARTIES TO MAKE ENDORSEMENTS IS NOT DIMINISHED BY THE STATE'S ACTION IN CONFERRING CERTAIN BENEFITS ON BALLOT-QUALIFIED PARTIES	10
V.	THE HATCH ACT CASES PROVIDE NO BASIS FOR UPHOLDING RESTRICTIONS ON POLITICAL SPEECH BY INDEPENDENT, NONGOVERNMENTAL ENTITIES SUCH AS POLITICAL PARTIES	16
CONCLUSION		18

TABLE OF AUTHORITIES

CASES	Pages
Abrams v. Reno (S.D. Fla. 1978) 452 F.Supp. 1166, aff'd (5th Cir. 1981) 649 F.2d 342	3
Austin v. Michigan Chamber of Commerce (1990) 110 S.Ct. 1391	11,13,14,15
Avery v. Midland County (1968) 390 U.S. 474	8
Baker v. Carr (1962) 369 U.S. 186	8
Bullfrog Films v. Wick (9th Cir. 1988) 847 F.2d 502	17
Concerned Democrats v. Reno (S.D. Fla. 1978) 458 F.Supp. 60	3
Eu v. Democratic Committee (1989) 489 U.S. 214	3
Federal Communications Commission v. League of Woman Voters (1984) 468 U.S. 364	16,17,18
Federal Elections Commission v. Massachusetts Citizens For Life (1986) 479 U.S. 238	11,13
Geary v. Renne (9th Cir. 1990) 895 F.2d 1230	passim.
Gomillion v. Lightfoot (1960) 364 U.S. 339	8
Gray v. Sanders (1963) 372 U.S. 368	8
Sherbert v. Verner (1963) 374 U.S. 398	11
Unger v. Superior Court (1984) 37 Cal.3d 612	4

TABLE OF AUTHORITIES (Continued)

CASES	Pages
Wood V. Georgia (1962) 370 U.S. 375	16
STATUTES	
United States Constitution:	
Article IV, Section 4 ("Republican Government Clause")	7,8
First Amendment	2,3,11
Fourteenth Amendment	3
California Constitution:	
Article II, Section 6(b)	passim.

NO. 90 - 769

- -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

- -

LOUISE H. RENNE, et al.,

Petitioners,

vs.

BOB GEARY, et al.,

Respondents

- -

BREIF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

- -

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant Petition for Writ of Certiorari is an egregious trespass upon the time and resources of this Court and opposing parties and counsel.

Petitioners seek review of a Court of Appeals decision invalidating a ban on endorsements by political parties, even though prior decisions of this Court and the lower courts are uniform in

holding such endorsement bans to be inconsistent with the First Amendment.

Review in this Court is sought even though petitioners adduced no evidence whatsoever below to support any claim that the challenged endorsement ban is necessary to support any compelling state interest.

Finally, the Petition is based largely on claims to the effect that the tremendous abridgement of First Amendment rights wrought by California's endorsement ban can be sustained as a measure relating to the structure of local government, or by analogy to this Court's decisions upholding restrictions on corporate political spending and the Hatch Act - arguments which run directly counter to settled decisional law.

There is no basis for this Court to review the well-reasoned opinion of the Court of Appeals in this case.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH UNANIMOUS AUTHORITY INVALIDATING BANS ON PARTY ENDORSEMENTS

By invalidating California's absolute ban on all political party endorsements of candidates running for local school and judicial office, the Court of Appeals reached a conclusion in harmony with every other reported decision to consider the same question.

The authorities are unanimous: All political party endorsement bans have been invalidated as inconsistent with the First and Fourteenth Amendments. See Eu v. Democratic Committee (1988) 489 U.S. 214 , aff'ing (9th Cir. 1987) 826 F.2d 814 (invalidating California law which barred pre-primary endorsements by political parties); Abrams v. Reno (S.D. Fla 1978) 452 F.Supp. 1166, aff'd (5th Cir. 1981) 649 F.2d 342 (invalidating ban on political party endorsements in primary elections); Concerned Democrats v. Peno (S.D. Fla. 1978) 458 F.Supp. 60 (invalidating ban on political party endorsements in judicial races).

No conflict in authorities warranting review

exists in this case.

II. NO HISTORICAL OR OTHER EVIDENCE EXISTS IN THIS CASE TO SUPPORT ANY ARGUMENT THAT THE CHALLENGED ENDORSEMENT BAN IS NECESSARY TO SUPPORT ANY COMPELLING STATE INTEREST

Petitioners inaccurately suggest that California's ban on political party endorsements dates back to Hiram Johnson and the Progressive Era.

Such is not the case.

While California did eliminate party nominations for local school, and judicial offices as of 1913, no prohibition on party endorsements of candidates for such offices existed prior to 1986! See Unger v. Superior Court (1984) 37 Cal.3d 612, 615-618.

During the intervening 73 years, it was "customary for the governing bodies of political parties to endorse or support candidates for non-partisan office." Unger, supra, at p. 616, emphasis added.

While petitioner suggests that the contrary is true, the record is devoid of any evidence that party endorsements led to corruption or any other ill effect claimed by petitioner on even one occasion during said 73 year period.

These points are forcefully stated in the opinion below. Geary v. Renne (9th Cir. 1990) 895 F.2d 1230 (Petitioner's Appendix A).

> We . . . reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without the benefit of a formal ban on partisan advocacy, and the State has offered nothing but speculative evidence to support its contention that the invalidation of §6(b) will generate a disastrous departure from the experience of the past.

Geary, supra, Pet. App. A, pp. 8-9., footnote omitted.

> The affidavits by various state officials offered in evidence by appellants fail to demonstrate that "the relative voice of /political parties/ has been overwhelming or even significant In influencing" nonpartisan elections, "or that there has been any threat to the confidence of the citizenry" in its nonpartisan officeholders. . . .

Id., at A-9, fn. 5.

> The dissent's description of California's populist reforms should not inadvertently mislead anyone into believing that Hiram Johnson and his reformers long ago enacted a prohibition against endorsements in nonpartisan elections. The reformers were not that out of touch with our Constitution. To the contrary, political parties were free to make endorsements in nonpartisan races in the period following the Johnson reforms, right up until 1986. Only then did the voters adopt the no-endorsement

> rule . . . . Until the adoption of the initiative measure in 1986, political parties were free to, and did, endorse in numerous nonpartisan elections. . . . And prior to 1986, few thought that the political process was in any great danger as a result. Thus, the historical events of the early 1900's cannot provide the basis for limiting the free speech rights of today's California Democrats, Republicans, and minor party members. Nor can the limitations of that speech be deemed necessary to the proper functioning of the nonpartisan election system. In reaching these conclusions, I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind - almost eighty years of endorsements in nonpartisan races and not a single example of a public official being unduly or improperly influenced.

Geary, supra, (Conc. Opinion of Reinhardt, J.), Petitioners' Appendix A, at pp. 14-15, footnotes omitted.

> Former court of appeal justice Winslow Christian's testimony simply presents one experienced individual's policy views on the subject of partisan endorsements in judicial elections. Certainly, those views can no more carry the day for an unconstitutional measure than can the popular vote. In any event, Mr. Christian's statement, like the rest of appellants' case, fails to offer a single fact, pro or con, relating to the making of a partisan endorsement, or its subsequent effect, in a nonpartisan race in California.

Id., at A-15, fn. 5

Since petitioners have failed to offer "a whit of evidence that party endorsements in non-partisan races ever, on even a single occasion, led to corruption or evil of any kind" (Geary, supra, (Conc. Opn. of Reinhardt, J.), Petitioners' Appendix A, p. 15), their writ petition raises no substantial question warranting review by this court.

III. THE ENDORSEMENT BAN CANNOT BE DEFENDED AS A MEASURE RELATING TO THE "STRUCTURE" OF LOCAL GOVERNMENT

Petitioners claim that California's interest in determining the "structure" of local government is, itself, a compelling state interest sufficient to override the free speech rights of political parties - despite the absence of any evidence in the record that political party endorsements ever - even in a single instance - led to corruption or evil of any kind during the period between 1913 and 1986.

In support of this claim, petitioners cite Article IV, Section 4 of the United States Constitution - the so-called "Republican Government Clause."

The claim that a State's power to determine the structure of local government could allow it to impair rights guaranteed to citizens by the United States Constitution has been considered and rejected by this Court on many occasions. See Gomillion v. Lightfoot (1960) 364 U.S. 339, 342, 344-345; Baker v. Carr (1962) 369 U.S. 186, 230; Gray v. Sanders (1963) 372 U.S. 368, 379, 381; Avery v. Midland County (1968) 390 U.S. 474, 480.

As this Court stated in Gomillion, supra, at p. 347:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insultation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Petitioners' reliance on the "Republican Government Clause" runs counter to consistent rulings by this court to the effect that said provision is not judicially enforcable. See Baker v. Carr, supra.

The Court of Appeals correctly rejected petitioners' "structural" arguments:

> We are not unmindful that "the Constitution grants to the States a broad power /to regulate Congressional elections under/ Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." . . . But as the Supreme Court has emphasized, the state's power to protect the integrity of its electoral processes "does not justify, without more, the abridgement of fundamental rights, such as the right to vote . . ., or, as here, the freedom of political association." . . .

Geary, supra, Petitioners' Appendix A, p. 9.

> That is not to say that the people of California do not have the right to use a system of nonpartisan elections for filling local and judicial offices. No one quarrels with that right. But the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected. For nearly eighty years, California's local and judicial elections have been "nonpartisan." Traditionally, and as California has applied the term, a nonpartisan election means that the candidates who appear on the general-election ballot are not selected by political parties. . . .
>
> California my continue to hold elections that are nonpartisan in the traditional sense. But there is all the difference in the world between refusing to delegate to political parties the decision as to which candidates appear on the general-election ballot and prohibiting political party organizations from announcing their views on the merits of candidates seeking public office. The latter directly

infringes on the right of free speech.
. . .

Geary, supra, (Conc. opn. of Reinhardt, J.), Petitioners' Appendix A, at p. 13.

IV. THE RIGHT OF POLITICAL PARTIES TO MAKE ENDORSEMENTS IS NOT DIMINISHED BY THE STATE'S ACTION IN CONFERRING CERTAIN BENEFITS ON BALLOT-QUALIFIED PARTIES

Petitioners claim that because California confers certain benefits on ballot-qualified political parties - such as free voter registration lists and the right to nominate candidates for most state offices - the state has a greater power to restrict political party speech in elections than would otherwise be the case.

Such contention runs counter to uniform holdings by this court to the effect that acceptance of government-conferred benefits cannot be used as a pretext for infringement of constitutional rights. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or the placing of conditions upon a benefit or

privilege." Sherbert v. Verner (1963) 374 U.S. 398, 404.

Petitioners' suggestion that Austin v. Michigan Chamber of Commerce (1990) __ U.S. __ /110 S.Ct. 1391/ has, somehow, changed the law is erroneous.

Austin and other cases upholding restrictions on corporate political spending are not premised on a theory that corporations diminish their entitlement to First Amendment rights by accepting state-conferred benefits such as limited liability.

Rather as this Court stated in Federal Election Commission v. Massachusetts Citizens For Life ("MCLF") (1986) 479 U.S. 238, 259:

"Regulation of corporate political activity . . . has reflected concern not about use of the corporate form per se, but about the potential of unfair deployment of wealth for political purposes."

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free

trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. . . . The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no relection of the power of its ideas.

> By requiring that corporate indepedendent expenditures be financed through a political committee expressly established to engage in campaign spending, /federal law/ seeks to prevent this threat to the political marketplace. The resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. . . .

Id., at p. 259.

Such rationale is entirely absent in the case of political parties. A political party, unlike a business corporation is "formed to disseminate political ideas, not to amass capital. The resources it has available are not the function of its success in the economic marketplace, but its popularity in the political marketplace," Ibid.

Furthermore, petitioners fail to recognize the narrow scope of decisions by this Court upholding restrictions on corporate political spending: All of the laws upheld have prohibited only campaign spending from the corporate general treasury, and have permitted corporate campaign contributions and campaign expenditures from separate political action funds. See MCFL, supra, 479 U.S. at p. 259; Austin, supra, 110 S.Ct. at p. 1398.

California Constitution, Article II, Section 6(b) has no such saving grace: It imposes a blanket ban on all advocacy by political parties in support or opposition to any candidate for local, school, or judicial office!

The Court of Appeals well understood these points in disposing of petitioners' arguments concerning Austin, supra:

> As support the state cites Supreme Court cases upholding limits on campaign contributions and spending, contending that political party endorsements create the same risks of corruption that the Court previously has determined justify governmental regulation of election spending. The analogy is flawed. In its most recent pronouncement in this area,

Austin . . ., the Court upheld a provision of the Michigan Campaign Finance Act prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections. In its defense Michigan contended that the unique legal and economic characteristics of corporations necessitated some regulation of their political expenditures in order to avoid corruption or the appearance of corruption. . . . Affirming that, in previous cases, "/w/e . . . have recognized that 'the compelling governmental interest in preventing corruption support/s/ the restriction of the influence of political war chests funneled through the corporate form,'" . . ., the Court found the Michigan statutory provision a legitimate check upon "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the /state-conferred/ corporate form and that have little or no correlation to the public's support for the corporation's political ideas." . . .

The corruption the Court found properly addressed by the Michigan statute was not of the kind decried by California here. Under the definition applied in past cases, "/c/orruption is a subversion of the political process" whereby "/e/lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." . . . "The halmark of corruption is the financial quid pro quo: dollars for political favors." . . .

By contrast, the Court explicitly has excluded from its definition the kind of conduct California seeks to prevent with § 6(b): "/t/he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political

> messages . . . can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." . . . The rationale underlying "the long history of regulation of corporate political activity" thus simply is not available as a justification for the complete suppression of speech by political parties, regardless of whether the elections in question are partisan or nonpartisan in nature. . . .
>
> . . . . . .
>
> Even in the campaign contribution and expenditure cases appellants cite as support for their position, the Supreme Court consistently has emphasized the limited nature of the restrictions it has upheld and the availability of alternative avenues of expressions for the affected speakers. . . .
>
> . . . . . .
>
> In Austin, for exampale, the Court found the Michigan enactment at issue to be "precisely targeted" to achieve its aims because it "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent expenditures through separate segregated funds." . . .

Geary, supra, Petitioner's Appendix A, pp. 4-5, 7, footnotes omitted, emphasis in original.

The Court of Appeals decision is fully consistent with Austin and does not warrant review.

V. THE HATCH ACT CASES PROVIDE NO BASIS FOR UPHOLDING RESTRICTIONS ON POLITICAL SPEECH BY INDEPENDENT, NONGOVERNMENTAL ENTITIES SUCH AS POLITICAL PARTIES

Petitioners suggest that California's political party endorsement ban may be upheld by analogy to cases sustaining restrictions on partisan activities by civil servants.

This analogy is flawed, for "the constitutionality of /such/ restriction/s/ is grounded in the Government's substantial and important interest in ensuring effective job performance by its own employees." Federal Communications Commission v. League of Woman Voters (1984) 468 U.S. 364, 401, fn. 27.

All attempts to apply such reasoning to support restrictions on political advocacy by persons or "independent, nongovernmental entities rather than . . . the Government's own employees" (League of Woman Voters, supra, at p. 401, fn. 27) have been consistently rejected. See League of Woman Voters, supra (invalidating ban on editorials by noncommercial educational broadcasters); Wood v. Georgia (1962) 370 U.S. 375,

395-395, fn. 21 (rejecting argument that speech of an elected public official, as opposed to a civil servant, could be restricted under rationale of Hatch Act cases); Bullfrog Films v. Wick (9th Cir. 1988) 847 F.2d 502 (invalidating restrictions on speech of film makers, film producers, and film distributors).

Finally, in upholding the Hatch Act, this Court has noted that "these restrictions evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of the government." League of Woman Voters , supra, at p. 401, fn. 27.

In the instant case "nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind - almost eighty years of endorsements in nonpartisan races and not a single example of a public official being unduly or improperly influenced." Geary, supra, (Conc. opn. of Reinhardt, J.) , Petitioners' Appendix A, p. 15.

Thus, as in League of Woman Voters - but unlike the Hatch Act cases - the political party endorsement ban "is not grounded in any prior governmental experience with less restrictive means." Id., at p. 401, fn. 27.

CONCLUSION

This case presents no conflict in decisions. Moreover, no substantial federal question warranting review by this Court is presented, since the decision of the Court of Appeals herein is totally consistent with prior decisions of this Court. The Petition should be denied.

Respectfully submitted,

ARLO HALE SMITH

Attorney for Respondents

66 San Fernando Way
San Francisco, CA 94127
(415) 564-6091

December 14, 1990

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney
for the City and County of
San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

LOUISE H. RENNE
City Attorney
Counsel of Record
DENNIS AITERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
(415) 554-4213

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

RESPONDENTS' AND AMICI'S ARGUMENT IS BASED ON A FAULTY READING OF THE HISTORY OF PARTY ENDORSEMENTS IN NONPARTISON ELECTIONS 2

THE REASONING OF *LETTER CARRIERS* IS NOT LIMITED TO CIVIL SERVICE EMPLOYEES 4

THE REASONING OF *AUSTIN* APPLIES TO THIS CASE 7

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) 7, 8, 9

Buckley v. Valeo, 424 U.S. 1 (1976) 5

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 4, 6

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 6

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 8

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 9

Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) 4, 6

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 4

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) 4

Unger v. Superior Court, 37 Cal.3d 612 (1984) 2, 7

STATUTES

California Constitution
Article II, section 6(b) 3

Miscellaneous
Lee, *The Politics of Nonpartisanship* (1960) 2, 3

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney
for the City and County of
San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

Petitioners Louise H. Renne, City Attorney for the City and County of San Francisco, *et al.*, respectfully submit this reply to certain arguments raised in the opposition briefs filed by Respondents Bob Geary, *et al.*, and Amici California Democratic Party, *et al.*

RESPONDENTS' AND AMICI'S ARGUMENT IS BASED ON A FAULTY READING OF THE HISTORY OF PARTY ENDORSEMENTS IN NONPARTISAN ELECTIONS.

Both Respondents and Amici emphasize Petitioners' "failure" to produce evidence of any evil resulting from party endorsements in nonpartisan elections before the voters specifically banned such endorsements in 1986. *See* Respondents' Brief, at 4-7; Amici's Brief, at 7, 17. Citing Justice Mosk's statement that before the ban, "it [was] customary for the governing bodies of political parties to endorse or assist candidates in elections for nonpartisan office," *Unger v. Superior Court*, 37 Cal.3d 612, 616 (1984), Respondents assert that the absence of any proven harm demonstrates that a prohibition on such endorsements is unnecessary to protect nonpartisanship or good government.

This argument, and the Ninth Circuit's opinion, perpetuate Justice Mosk's misreading of the study on which he relied. *Id.*, at fn. 7, citing Lee, *The Politics of Nonpartisanship*, Tables 32 and 33 at 103 (1960) [attached as Appendix A to this brief]; *see also*, App. to Petition, at A-8 – A-9, A-14. Lee's survey does not show that party endorsements were customary before section 6(b) was enacted.

The question asked in Lee's survey was this: "In any election for city, county, or school office (not state or national office) in your county in the last four years, has there been any public or openly visible activity on the part of either political organization: county committee, local political clubs, party officials or representatives,

etc.?" [Emphasis omitted.] Lee, at 102-03, 201. Survey respondents in only 11 of 44 counties (25%) and 18 of 192 cities (9%) answered affirmatively. *Id.*, at 102-03. Endorsements occurred in at most 4 of 44 counties (9%) and in at most 13 of 192 cities (7%). *Id.*, Table 33 at 103. Given the wording of the questions asked in the survey, even these endorsements may have been made either by non-official political clubs (as opposed to central committees) or by party officials in their individual capacity.[1] Such endorsements would not be proscribed by section 6(b). Furthermore, none of Lee's data address judicial elections, and the data collected applies only to a four-year period in the late 1950s.

Thus, Lee's results provide no basis for concluding that party endorsements were customary before 1986. Indeed, the study supports the opposite conclusion: party endorsements in nonpartisan races occurred at most sporadically. Even the Ninth Circuit *en banc* court recognized that local party organizations in the vast majority of counties in California did *not* endorse in nonpartisan races even before section 6(b) was enacted. App. to Petition, at A-1.

Respondents are therefore wrong in asserting that California's tradition of independent local politics is unrelated to the state's limits on partisan political activity. From 1913 to 1986, California's political parties by and large refrained from the partisan activity that section 6(b) forbids. The absence of any history of bossism or machine

---

[1] Similarly, fundraising occurred in at most 7 of the 44 counties (16%) and at most 9 of 192 cities (5%). Lee, Table 33 at 103. Again, it is unclear whether these were funds raised by official parties or unofficial political clubs.

politics actually demonstrates the benefits which result when official parties do not endorse in local and judicial elections. As Judge Trott wrote in the original panel decision, "The durability and efficacy of a solution should not be used as a reason to ignore its *raison d'etre*." App. to Petition, at A-97.

This Court has repeatedly rejected the argument that "a State's political system [must] sustain some level of damage before the legislature [may] take corrective action." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Munro*, the Court held that a state was not required to make a particularized showing of actual harms suffered prior to the imposition of reasonable restrictions on ballot access. 479 U.S. at 194-95. Thus, even in the absence of definitive evidence on this issue, the voters of California are entitled to act on the basis of their reasonable belief that partisan endorsements are incompatible with a system of nonpartisan elections. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (lawmakers may assume without scientific data that exposure to obscene material adversely affects individuals and society).

THE REASONING OF *LETTER CARRIERS* IS NOT LIMITED TO CIVIL SERVICE EMPLOYEES.

Respondents argue that this Court has rejected all attempts to extend the reasoning of *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) to persons or "independent, nongovernmental entities rather than . . . the Government's own employees." *See* Respondents' Brief, at 16, quoting *Federal*

Communications Commission v. League of Women Voters, 468 U.S. 364, 401 fn. 27 (1984). In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), however, this Court specifically relied upon *Letter Carriers* in upholding government limitations on campaign contributions:

> In *CSC v. Letter Carriers, supra*, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." [Citations omitted.]

424 U.S. at 27. Thus, Respondents' assertion that the reasoning of *Letter Carriers* has been limited to the context of federal employees is simply incorrect.

Amici also challenge Petitioners' reliance upon *Letter Carriers*. Amici first argue that the *Buckley* Court "specifically *rejected* the argument that an interest in impartial government justifies a ban on endorsements in *partisan* elections." [First emphasis in original, second emphasis added.] *See* Amici's Brief, at 13. Amici also argue that the *Buckley* Court held that *"Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections. . . . " *Id.*

Neither point is persuasive. As to the first, we are not dealing here with *partisan* elections.[2] As to Amici's second point, it is one which no one disputes: the Hatch Act did not restrict the right of government employees to make their individual views known, but merely restricted the employees' associational rights to participate in partisan political campaigns. *See Letter Carriers, supra,* 413 U.S. at 568 and fn. 15, 575-76, 579. Similarly, while section 6(b) restricts the collective rights of persons associated in official parties, it places no limitations on individual expressions of opinion.

Finally, Respondents' reliance on *League of Women Voters, supra,* fails. There, the Court invalidated a statute prohibiting editorializing by public television stations. Significantly, however, the plaintiffs in that case did not even challenge the portion of the statute prohibiting stations from supporting or opposing candidates for public

---

[2] In urging that the decision in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), controls this case, Amici assert that any distinction between endorsements in partisan and nonpartisan races is immaterial. *See* Amici's Brief, at 4-6. Amici rely heavily upon the Ninth Circuit's statement that "there is nothing in this Court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon that fact that partisan offices were at issue." App. to Petition, at A-6.

The absence of such a suggestion, however, proves nothing. The question in *Eu* was whether the interests California offered for banning party endorsements in party primaries were compelling. In answering that question negatively, this Court and the Ninth Circuit properly did not attempt to analyze California's very different interest in banning endorsements in nonpartisan elections.

office, and the Court indicated that such a challenge would make a different case. 468 U.S. at 371 fn. 9.

THE REASONING OF *AUSTIN* APPLIES TO THIS CASE.

Respondents and Amici both attempt to distinguish *Austin v. Michigan Chamber of Commerce,* 110 S.Ct. 1391 (1990), arguing that the analogy to corporations and their state-conferred abilities to accumulate capital is flawed. *See* Respondents' Brief, at 11-12; Amici's Brief, at 14-16. They assert that *Austin* only applies to examples of disproportionate financial influence, and that political parties do not present the same threat to the political process.

Respondents' and Amici's reading of *Austin* is too narrow. While that case involved the regulation of corporate political activity in the context of state-conferred economic benefits, the *Austin* Court's concerns were far broader. The Court's fundamental point was that the state had a compelling interest in eliminating the potential for those entities enjoying state-conferred advantages to distort the political process.

Here, the state-conferred advantages are *political* rather than *economic*. The evil addressed by section 6(b) is disproportionate *political* influence in the nonpartisan context. Section 6(b) only restricts endorsements or partisan activity by those organizations which enjoy statutory political advantages by virtue of their status as official parties. It does not limit endorsements or partisan activity by those political organizations which do not take advantage of those statutory privileges.

Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), Respondents and Amici argue that the influence of official parties derives from their political popularity, not from their success in the economic marketplace. *See* Respondents' Brief, at 12; Amici's Brief, at 15. But *MCFL* is easily distinguished. The regulation there was like the one in *Austin*; it restricted political expenditures by corporations. The Court found no compelling interest in applying such regulation to advocacy organizations which do not use their corporate, statutory benefits to *economic* advantage. 479 U.S. at 263-64. Here, by contrast, the statutory advantages are not economic but political, and the state has a compelling interest in preventing official parties from using those advantages to distort the nonpartisan political process.

Respondents also argue that *Austin* cannot be read to require corporations to give up part of their entitlement to First Amendment rights as a condition of accepting state-conferred economic advantages. *See* Respondents' Brief, at 11. The issue here and in *Austin*, however, is not the diminution of corporate rights, but whether the state's interest in imposing a particular restriction on political speech is compelling. As the *Austin* Court held, Michigan had a compelling interest in "*counterbalanc[ing]* those advantages unique to the corporate form. . . ." [Emphasis added.] 110 S.Ct. at 1400. California likewise has a compelling interest in counterbalancing, in the nonpartisan context, those political advantages unique to the ballot-qualified parties.

Amici assert that Petitioners' claims regarding the disproportionate political influence granted to official parties are "demonstrably wrong." As proof, they assert

that while the California Democratic Party and the California Peace and Freedom Party both enjoy the same statutory advantages, they have "grossly disparate" influence. *See* Amici's brief, at 15-16. However, the record does not establish that the minor official parties are without influence in all locales. In Berkeley, California, for example, the influence of the Democratic or Republican Party may not exceed that of the Peace and Freedom Party. The First Amendment does not compel the state to test periodically the local influence of qualified parties and to confine its regulation to those which pass some unspecified standard.

The language of *Austin* confirms this point. In rejecting an argument that the Michigan statute was overinclusive because it banned independent campaign expenditures even by noninfluential corporations, the Court emphasized that it was concerned with the *potential* to distort the political process by means of state-conferred advantages. 110 S.Ct. at 1398, quoting *FEC v. National Right to Work Committee*, 459 U.S. 197, 209-210 (1982). It was precisely the potential for such advantages to be used to distort the nonpartisan electoral system which prompted the voters of California to place restrictions on campaign activities by the official parties.

For these reasons, and the reasons already presented, the Petition for Writ of Certiorari should be granted.

DATED: January 2, 1991

Respectfully submitted,

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys

By LOUISE H. RENNE
City Attorney
Counsel of Record

Attorneys for Petitioners

APPENDIX A

[Excerpt from Lee, *The Politics of Nonpartisanship* (1960)]

[page 102]

* * *

THE STATEWIDE SCENE

How partisan are nonpartisan politics? What do local officials and party leaders think about the role of the party in city elections? These questions were made the object of the state-side survey. This question was asked: "In any election for *city* or *school* office in your city in the last *four* years, has there been any *public or openly visible activity* on the part of either political organization: county committee, local political clubs, party officials or representative, etc.?" Only eighteen (9 per cent) of the 192 cities indicated the existence of such activity; the larger the city the more frequent was an affirmative reply.

TABLE 31

Cities Reporting Political Organizations Active In City or School Elections

Size of city	Total number of cities	Per cent
Less than 10,000	90	2
10,000 – 50,000	82	13
50,000 and more	20	25
Total	192	9

Of the eighteen cities, one party or both were reported active in mayoralty campaigns in four cities; in

school-board campaigns in seven cities; and in city-council races in sixteen cities. (The relatively low figure for mayoralty races indicates the small number of separately elected mayors in the state.) Democratic activity

[page 103]

only was reported in five cities, Republican activity only in three cities, and both parties active in nine cities. (For one city, this phase of the question was not answered.)

Similar results were obtained from the questionnaire distributed to county central-committee chairman of both political parties. An almost identical question to that quoted above, but including consideration of county office, was asked. In 11 (25 per cent) of the 44 counties from which at least one questionnaire was returned, party organization activity in city, county, or school elections was reported. As did the larger city, the larger counties tended to report such activity more frequently.

TABLE 32

Counties Reporting Political Organizations Active in City, County, or School Elections

Size of county	Total number of counties	Per cent
Less than 25,000	14	14
25,000 – 100,000	22	18
100,000 and more	8	64
Total	44	25

In one county, the Republicans alone were reported active in three counties the Democrats only, in four counties both parties, and in three counties this part of the question was not answered. No relationship was apparent between the reported existence of party activity and the relative strength of the party in the county in terms of its percentage of the two-party registration. City, county, and school offices all appeared to command a similar interest, each being mentioned in five or six counties.

Table 33 shows the types of political activities reported in the questionnaires.

TABLE 33

Political Activity in City and Counties, by Party

Political activity	Republicans active		Democrats active	
	Cities	Counties	Cities	Counties
Public endorsement of candidates	5	1	8	3
Use of party precinct machinery	5	3	6	6
Use of funds or fund raising	6	4	3	3

[End of excerpt]

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

LOUISE H. RENNE
City Attorney
Counsel of Record
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
(415) 554-4213

Counsel for Petitioners

ARLO HALE SMITH
Counsel of Record
66 San Fernando Way
San Francisco, CA 94127
(415) 564-6091

Counsel for Respondents

Petition For Certiorari Filed November 13, 1990
Certiorari Granted January 14, 1991

TABLE OF CONTENTS

Page

Relevant Docket Entries. 1

Complaint for Injunctive and Declaratory Relief for Violation of Civil Rights (09/11/87). 2

Answer to Complaint for Injunctive and Declaratory Relief for Violation of Civil Rights (10/26/87) 8

Motion for Summary Judgment (02/08/88). 11

Declaration of Arlo Hale Smith In Support of Summary Judgment (02/08/88) 12

Declaration of Terence Faulkner In Support of Summary Judgment (02/08/88) 15

Supplemental Declaration of Arlo Hale Smith In Support of Summary Judgment (02/29/88). 17

Supplemental Declaration of Terence Faulkner In Support of Summary Judgment (02/29/88). 21

Order Granting Partial Summary Judgment (04/27/88) . . . . . Pet. App. A-114

Judgment (04/27/88) 24

Notice of Motion and Motion to Vacate Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (05/06/88) 25

Declaration of Winslow Christian In Support of Defendants' Motion to Vacate Judgment (05/06/88) 27

Declaration of Pat Russell In Support of Defendants' Motion to Vacate Judgment (05/20/88). 29

Declaration of Quentin Kopp In Support of Defendants' Motion to Vacate Judgment (05/20/88). 31

TABLE OF CONTENTS – Continued

Page

Declaration of Richard Mountjoy In Support of Defendants' Motion to Vacate Judgment (05/20/88) 35

Declaration of Arlo Hale Smith (05/23/88)..... 38

Order Denying Defendants' Motion to Vacate Judgment (06/09/88) 40

Ninth Circuit Decision (07/24/89).....Pet. App. A-67

Order for Reconsideration (02/06/90) ..Pet. App. A-113

Ninth Circuit *En Banc* Decision (08/14/90) . Pet. App. A-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 11, 1987 – Complaint for injunctive and declaratory relief filed by plaintiffs Bob Geary, *et al.*, in U.S. District Court for the Northern District of California.

October 26, 1987 – Answer filed by defendants Louise Renne, San Francisco City Attorney, *et al.*

February 8, 1988 – Plaintiffs' motion for summary judgment filed.

April 27, 1988 – Order entered granting plaintiffs summary judgment on third cause of action challenging constitutionality of Article II, Section 6(b), of the California Constitution.

May 2, 1988 – Final judgment entered on third cause of action.

May 6, 1988 – Defendants' motion to vacate judgment filed.

June 9, 1988 – Order entered denying defendants' motion to vacate judgment.

June 22, 1988 – Defendants' notice of appeal filed.

July 24, 1989 – Opinion and judgment of the Court of Appeals for the Ninth Circuit issued, reversing the Northern District's judgment.

February 6, 1990 – Order granting rehearing *en banc* issued by the Ninth Circuit.

August 14, 1990 – *En banc* opinion and judgment of the Ninth Circuit issued, affirming the Northern District's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, *et al.*,

Plaintiffs

v. C 87 4724 AJZ

LOUISE RENNE, San Francisco City Attorney, *et al.*,

Defendants

PLAINTIFFS' COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATION OF CIVIL RIGHTS

Filed September 11, 1987

GENERAL ALLEGATIONS

1. Plaintiffs BOB GEARY, ROBERT SILVESTRI, DENNIS MARK, MELISSA GUNDRUN, WAYNE JOHNSON, DAVID SOULE, MAX WOODS, PETER JOHNSON, ROBERT GEBERT, and TERENCE FAULKNER are residents and registered voters of the City and County of San Francisco (hereafter "City and County").

2. Defendant DIANNE FEINSTEIN is Mayor of the City and County and is sued herein in her official capacity.

3. Defendant LOUISE RENNE is City Attorney of the City and County and is sued herein in her official capacity. As City Attorney Ms. Renne is responsible for representing other officials of the City and County in actions commenced by them.

4. Defendant PATTERSON is Registrar of Voters of the City and County and is sued herein in his official capacity. As Registrar of Voters Patterson is responsible for conducting elections in the City and County, publishing voter information pamphlets issued on behalf of the City and County, and enforcing election laws of the State of California and the City and County of San Francisco.

5. Defendant CITY AND COUNTY OF SAN FRANCISCO is a municipal corporation of the State of California.

6. Defendant BOARD OF SUPERVISORS is the legislative body of the City and County and is sued herein in its official capacity.

7. Plaintiff ELECTION ACTION is an organization dedicated to placing measures on the ballot by initiative, and campaigning for and against ballot propositions.

8. Plaintiff SUDI TRIPPET is coordinator of ELECTION ACTION.

9. In doing all acts alleged herein, defendants have been, or threaten to be, acting under color of state law.

10. In connection with each municipal election, the City and County mails a voters pamphlet to all registered voters. Said pamphlet contains ballot arguments for and against City and County measures, and statements of qualifications of candidates for City and County offices. Defendant PATTERSON is responsible for preparing and publishing said voters pamphlet.

* * *

20. This court has jurisdiction over this action pursuant to 28 U.S.C. 1331 and 1343.

* * *

THIRD CAUSE OF ACTION

31. Plaintiffs incorporate by reference paragraphs 1 through 10 and 20.

32. Plaintiff FAULKNER is Chairman of the San Francisco Republican County Central Committee and an elected member of said committee.

33. Plaintiffs WOODS, SILVESTRI, and MARK are elected members of the San Francisco Republican County Central Committee.

34. Plaintiff GEARY is an elected member of the San Francisco Democratic County Central Committee.

35. Article II, Section 6 of the California Constitution purports to outlaw actions by county central committees of political parties that have achieved ballot status – including the Republican and Democratic Parties – to endorse, support or oppose candidates for city or county offices.

36. Plaintiffs GEARY, FAULKNER, WOODS, SILVESTRI, and MARK desire to endorse, support, and oppose candidates for city and county office through their county central committees, and to publicize such endorsements by having said endorsements printed in candidate's statements published in the voter's pamphlet.

37. Each of plaintiffs would desire to read endorsements of candidates for city and county office as part of candidate's statements printed in the San Francisco voters pamphlet.

38. In the past, defendants PATTERSON and CITY AND COUNTY OF SAN FRANCISCO have deleted all references in candidate's statements for City and County offices to endorsements by political party central committees or officers or members of such committees. Unless restrained from doing so by order of this court, defendants threaten to continue to delete or exclude all references in candidate's statements to endorsement of candidates by political party central committees, or officers or members of such central committees.

39. An actual controversy exists in that:

a. Plaintiffs contend that Article II, Section 6 of the California Constitution, and any other state or local law relied upon by defendants to refuse to print endorsements of candidates for city and county office by county central committees or members or officers of such committees are violative of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983 and 1985, in that said laws abridge plaintiffs' rights to free speech and association.

b. Defendants PATTERSON and CITY AND COUNTY OF SAN FRANCISCO dispute said contentions.

40. Plaintiffs and each of them have been injured by the past and threatened conduct of PATTERSON and CITY AND COUNTY OF SAN FRANCISCO in deleting endorsements of candidates for City and County office by

political party central committees and officers and members of such committees from candidate's statements printed in the voter's pamphlet.

41. Because of the past and threatened conduct of said defendants in deleting endorsements of candidates for City and County office by political party central committees and officers and members of such committees from candidate's statements printed in the voters pamphlet, plaintiffs have suffered and will suffer great and irreparable injury, in that they will be denied their constitutional and civil rights of free speech and free association, so that plaintiffs cannot fairly be compensated by damages, and are without any adequate remedy at law.

WHEREFORE, plaintiffs pray for judgment:

* * *

3. For a judicial declaration that Article II, Section 6 of the California Constitution is unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983 and 1985.

* * *

6. For a temporary restraining order, preliminary injunction and permanent injunction to restrain PATTERSON and the CITY AND COUNTY OF SAN FRANCISCO from deleting from any candidate's statement for City and County office any reference to endorsement of the candidate by a political party central committee or a member or officer of such central committee.

* * *

8. For costs, including reasonable attorney fees.

DATED: September 8, 1987

ARLO HALE SMITH
Attorney for Plaintiffs

TERENCE FAULKNER
Plaintiff In Pro. Per.

SUDI TRIPPET
Plaintiff In Pro. Per.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEFENDANTS' ANSWER TO COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATION OF CIVIL RIGHTS

Filed October 26, 1987
[Caption Omitted In Printing]

COMES NOW Defendants LOUISE RENNE, San Francisco City Attorney; DIANNE FEINSTEIN, San Francisco Mayor; BOARD OF SUPERVISORS, City and County of San Francisco; CITY AND COUNTY OF SAN FRANCISCO; and, JAY PATTERSON, San Francisco Registrar of Voters, and, in answer to the Complaint for Injunctive and Declaratory Relief for Violation of Civil Rights on file herein, do admit, deny and allege as follows:

GENERAL ALLEGATIONS

I. In response to the allegations contained in paragraphs 1, 7 and 8 of the Complaint, Defendants lack information and belief sufficient to form an answer and on that basis deny each and every such allegation.

II. In response to the allegations contained in paragraphs 2, 3, 4, 5, 6, 9 and 10 of the Complaint, Defendants admit each and every such allegation.

* * *

VI. In response to the allegations contained in paragraphs 16, 17, 19 and 20 of the Complaint, Defendants deny each and every such allegation.

* * *

THIRD CAUSE OF ACTION

XI. In response to the allegations contained in paragraph 31 of the Complaint, Defendants incorporate by reference and reallege each and every response in paragraphs I, II and VI.

XII. In response to the allegations contained in paragraphs 32, 33, 34, 36 and 37 of the Complaint, Defendants lack information and belief sufficient to form an answer and on that basis deny each and every such allegation.

XIII. In response to the allegations contained in paragraphs 35, 40 and 41 of the Complaint, Defendants deny each and every such allegation.

XIV. In response to the allegations contained in paragraphs 38 and 39 of the Complaint, Defendants admit each and every such allegation.

* * *

AS AND FOR A FOURTH SEPARATE AND AFFIRMATIVE DEFENSE, Defendants allege that Plaintiffs have failed to allege facts in their Third Cause of Action sufficient to state a cause of action against Defendants.

WHEREFORE, Defendants pray that:

1. The injunctive relief prayed for by Plaintiffs be denied;

2. The declaratory relief prayed for by Plaintiffs be denied;

3. Defendants be awarded their costs of suit, including reasonable attorneys fees; and,

4. The Court award such other and further relief as it deems just and proper.

DATED: October 26, 1987

LOUISE H. RENNE
City Attorney
BURK E. DELVENTHAL
THOMAS J. OWEN
ROSE MIKSKOVSKY
Deputy City Attorneys

Attorneys for Defendants

[Proof Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filed February 8, 1988
[Caption Omitted In Printing]

Notice is hereby given that at 1:30 PM on March 7, 1988 before Courtroom 14, United States District Court, 450 Golden Gate Avenue, San Francisco, CA, plaintiffs and each of them will move the Court for summary judgment on the First and Third Causes of Action herein. Said motion will be made on the basis of this notice, the accompanying declarations and points and authorities, the Declarations of Terence Faulkner and Sudi Trippet filed herein on September 22, 1987, and the files, papers, and records herein, and such other and further evidence or authorities as may be offered at or before the hearing on this matter. Said motion will be made on the grounds stated in the accompanying points and authorities.

DATED: February 8, 1988

Arlo Hale Smith
Attorney for Plaintiffs

Terence Faulkner
Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF ARLO HALE SMITH IN SUPPORT OF SUMMARY JUDGMENT

Filed February 8, 1988
[Caption Omitted In Printing]

I, ARLO HALE SMITH, say:

I am now, and have been since 1980, a member of the San Francisco Democratic County Central Committee (hereafter "Democratic Committee"). Bob Geary, a plaintiff herein, also is now and has been since 1980, a member of the Democratic Committee.

Since at least 1982, it has been the policy of the Democratic Committee to assert the right to make endorsements of candidates for nonpartisan, i.e. local, school and judicial offices, voted on in San Francisco. The Democratic Committee, in fact, endorsed Mary Callanan for the nonpartisan local office of City Treasurer in 1985. In 1985 and 1986, the Democratic Committee passed resolutions opposing amendment of California Constitution, Article II, Section 6, to prohibit county committee endorsements for candidates for nonpartisan office, and actively campaigned against adoption of said amendment. Bob Geary voted in favor of said endorsement and resolutions. In elections since 1986, the Democratic Committee has declined to endorse candidates for nonpartisan office solely out of concern that committee members may be criminally or civilly prosecuted for violation of the endorsement ban contained in Article II, Section 6 of the California Constitution.

Bob Geary has run for office on at least two occasions and attempted to use county committee titles in his candidates statements. In 1980, Mr. Geary attempted to use the title of Patrick Fitzgerald as a Democratic County Committeemember in a candidate's statement for Supervisor. In 1982, Mr. Geary attempted to use his own title as Democratic Committeemember in his own candidate's statement for BART Board. In both cases, San Francisco Registrar of Voters Jay Patterson deleted the word "Democratic" from the candidate's statements.

I am counsel for appellants on two appeals from censorship orders obtained by Renne and Patterson pursuant to Elections Code Sections 3795 and 5025. Said cases are *Patterson* v. *Board of Supervisors* (S.F. Superior Court No. 873695; Court of Appeal, First District: No. A038352) (hereafter "Geary case") and *Patterson* v. *Board of Supervisors* (S.F. Superior Court No. 880904; Court of Appeal, First District: No. A039856) (hereafter "Faulkner case"). The appeal in the Geary case has been pending since April, 1987; in the Faulkner case since September, 1987. In both cases, I made motions to the California Court of Appeal for calendar preference in September, 1987. Although said motions were not opposed by the respondents, the motion for calendar preference was denied in the Faulkner case on or about October 29, 1987, and in the Geary case on or about November 23, 1987. Further details concerning the Geary and Faulkner cases are contained in the Declaration of Terence Faulkner (filed September 22, 1987) at pp. 3-4 and Exhibit A.

In enforcing Elections Code Sections 3795 and 5025, Renne and Patterson have acted in a highly selective and discriminatory fashion. This becomes readily apparent if

the Court contrasts the November, 1987 ballot arguments censored by Renne and Patterson pursuant to said statutes with arguments that have appeared in past voter's pamphlet and the November, 1987 voter's pamphlet without being subjected to such censorship proceedings. See Faulkner Declaration (filed September 22, 1987), Exhibit A, pp. 21-25, 47, 54, 71, 72, 75-130. The argument which appears at p. 54 of Exhibit A to said declaration was, in fact, printed at p. 98 of the November, 1987 San Francisco Voter's Pamphlet in unedited form. The Court is requested to compare said argument with those that were censored.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: February 6, 1988

ARLO HALE SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF TERENCE FAULKNER IN SUPPORT OF SUMMARY JUDGMENT

Filed February 8, 1988
[Caption Omitted In Printing]

I, TERENCE FAULKNER, say:

I am now, and have been since January, 1987, Chair of the San Francisco Republican County Central Committee (hereafter "Republican Committee"). I have served as a voting member of the Republican Committee at all times since 1974.

It is the policy of the Republican Committee to endorse candidates for nonpartisan, i.e. local, school, and judicial, offices. Until 1980, the Republican Committee regularly endorsed candidates for such offices at every election. In 1987, the Republican Committee endorsed Arlo Smith for District Attorney, Michael Hennessey for Sheriff, and John Molinari for Mayor, despite objections from some that such endorsements are prohibited by California Constitution Article I, Section 6. It is the plan and intention of the Republican Committee to endorse candidates for nonpartisan offices in as many future elections as possible. The Republican Committee would like to have such endorsements publicized by endorsed candidates in their candidate's statements in the San Francisco voter's pamphlet, and to encourage endorsed candidates to so publish their endorsements by the Republican Committee.

In the future, I and other Republican Committee members, including Robert Silvestri, Dennis Mark and Max Woods, would like to use our titles as Republican County Committeemen in endorsements we make of local candidates which are printed in the San Francisco voter's pamphlet. We cannot presently do so as Jay Patterson has a policy of deleting the word "Republican" from all such endorsements.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: February 8, 1988

TERENCE FAULKNER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL DECLARATION OF ARLO HALE SMITH IN SUPPORT OF SUMMARY JUDGMENT

Filed February 29, 1988
[Caption Omitted In Printing]

I, ARLO HALE SMITH, declare:

I am presently Corresponding Secretary of the San Francisco Democratic County Central Committee ("Democratic Committee") and have served as an elected member of the Democratic Committee at all times from July, 1980 to the present. Prior to 1980, I was an officer of at least three different Democratic clubs in San Francisco at various times over a 7-year period.

At the present time, I serve as a member of the Board of Directors of the Bay Area Rapid Transit District (BART) – a nonpartisan office to which I was elected in November, 1986.

At the present time, I am aware of the existence of a large number of organizations in San Francisco which use the word "Democratic" as part of their names. These organizations include: San Francisco Democratic Club, Alice B. Toklas Lesbian/Gay Democratic Club, Harvey Milk Lesbian/Gay Democratic Club, Stonewall Gay Democratic Club, Latino Democratic Club, Raoul Wallenberg Jewish Democratic Club, Chinese American Democratic Club, City Democratic Club, San Francisco Democratic Women's Forum, and Golden Gate Democratic Club. I am personally a member of all of the aforementioned organizations. Each of said organizations regularly endorses

candidates for nonpartisan (local, school and judicial) office in San Francisco. All of said organizations, except the two last named, send out slate cards to at least several thousand Democratic voters at each election. Said slate cards contain endorsements of the organizations in question for nonpartisan offices in San Francisco.

I am also aware of the existence of a statewide organization of Democratic Clubs known as the California Democratic Council (CDC). In the past I have served as a delegate to at least four CDC conventions. CDC regularly endorses candidates for nonpartisan statewide office, such as judges and Superintendent of Public Instruction.

The California Democratic State Central Committee and San Francisco Democratic County Central Committee exercise no control over the endorsements of any of the foregoing organizations. Indeed, on many occasions endorsements of such organizations are contrary to those of the central committees. For example, in the November, 1987 municipal general election in San Francisco, the Democratic Committee endorsed a "NO" vote on Proposition T, while the San Francisco Democratic Club recommended a "YES" vote on said measure.

I am also aware of a large number of organizations that do not use the words "Democratic" or "Republican" in their names, but which regularly endorse candidates for nonpartisan office. Some such organizations include: the San Francisco Labor Council, the San Francisco Building Trades Council, the San Francisco Black Leadership Forum, and the Chinese Six Companies. As an elected official, I have been lobbied by several of these groups, particularly the San Francisco Labor Council and San

Francisco Building Trades Council on numerous occasions concerning legislation pending before the BART Board. Indeed, it has been my personal experience that labor organizations are willing to contribute thousands of dollars to candidates they support in BART Board races, while the various Democratic clubs that I have mentioned above contribute little or no money to campaigns of BART Board candidates.

I am also personally familiar with the fact that there are presently five political parties which have qualified to appear on the ballot in California, and to nominate candidates for all partisan offices in the State. Those political parties are: the Democratic Party, the Republican Party, the American Independent Party, the Libertarian Party and the Peace and Freedom Party. Of said five parties, only the Democratic Party and Republican Party have any significant membership or political influence. Indeed, the other three aforementioned parties generally do not nominate candidates for most of the partisan offices which appear on the ballot at any given general election. The Peace and Freedom and Libertarian Parties each have registrations of less than 1% of the registered voters in California, while the American Independent Party has a registration of less than 2% of California's registered voters. To my knowledge, no candidate nominated by any of these three parties has ever won a general election for any office in California. Indeed, the influence of said parties on candidates and officeholders is far less than that of other political organizations, such as labor unions and corporate political action committees. In San Francisco, for example, the San Francisco Labor Council and the Sierra Club have far greater political influence than

do the Libertarian, Peace and Freedom or American Independent Parties.

In addition to the foregoing political parties, I am familiar with the existence of a number of political parties in San Francisco and California which have not qualified to appear on the ballot. These would include the Socialist Workers Party, Communist Party and Spartacist League. The three aforementioned political organizations have in the past run and endorsed candidates for public office – including nonpartisan local office. The total voter registration and political influence of said organizations is, however, even less than that of the American Independent, Libertarian or Peace and Freedom Parties.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: February 26, 1988

ARLO HALE SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL DECLARATION OF TERENCE FAULKNER IN SUPPORT OF SUMMARY JUDGMENT

Filed February 29, 1988
[Caption Omitted In Printing]

I, TERENCE FAULKNER, say:

I am Chairperson of the San Francisco Republican County Central Committee. I have served as a member of the San Francisco Republican County Central Committee at all times since 1974.

At the present time, a large number of unofficial organizations which use the name "Republican" in their names exist in San Francisco. Such organizations include Concerned Republicans For Individual Rights (CRIR), Teenage Republicans (TARs), San Francisco Young Republicans (SFYRs), California Republican League, California Republican Assembly, San Francisco Federated Republican Women, Russian American Republican Club, California Chinese Republican Association, and Chinese American Republican Club.

Most of the foregoing organizations have endorsed candidates for nonpartisan office (i.e. judicial, school, and local offices) in at least some past elections.

I am specifically aware that two of the foregoing organizations, YR's and CRIR, endorse candidates for such nonpartisan office at almost every election, and regularly issue slate cards to Republican voters listing those organizations' endorsements. In connection with

the November, 1987 general municipal election, YR's issued a slate card which was mailed to all Republican voters in San Francisco which recommended election of John Molinari for Mayor. In connection with the November, 1986 general election, CRIR mailed a slate card to several thousand Republican voters in San Francisco which recommended election of Pat Norman for Supervisor, Greg Day for School Board, Paul Wotman for Community College Board, Eugene Garfinkle for BART Board, and a "NO" vote on confirmation of California Supreme Court Chief Justice Rose Bird, among other endorsements.

I am also aware that at least three separate statewide federations of Republican Clubs exist: California Republican League (CRL), California Republican Assembly (CRA) and United Republican Clubs of California (URC). These statewide organizations all use the word "republican" in their names. CRA and CRL regularly make endorsements on all statewide offices, including nonpartisan offices (such as judges and Superintendent of Public Instruction). URC has indicated plans to make such endorsements in the future.

All of the foregoing organizations are autonomous from both the California Republican Party and California Republican State Central Committee, and the San Francisco Republican Party and San Francisco Republican County Central Committee. The California Republican State Central Committee and San Francisco Republican County Central Committee exercise no control over the activities or making of endorsements by such organizations. Indeed, in many cases the endorsements made by such organizations are contrary to those of the California

Republican State Central Committee and San Francisco Republican County Central Committee. For example, in connection with the November, 1987 San Francisco municipal general election, the San Francisco Republican County Central Committee recommended a "Yes" Vote on Proposition T (an initiative measure to reverse the giveaway of an $8 million City street to a developer), while CRIR and YR's recommended a "NO" vote on the same measure.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: February 26, 1988

TERENCE FAULKNER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, *et al.*,

Plaintiffs

v. C 87 4724 AJZ

LOUISE RENNE, San Francisco City Attorney, *et al.*,

Defendants

JUDGMENT

Filed April 27, 1988

This action having come before this Court, the Honorable Alfonso J. Zirpoli, United States District Judge presiding, and the issue having been duly presented and an order partially granting plaintiff's motion for summary judgment having been duly filed herein,

IT IS ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment as to the THIRD CAUSE OF ACTION is granted.

IT IS FURTHER ORDERED AND ADJUDGED that there being no just reason for delay, judgment shall be entered pursuant to Rule 54(b).

DATED: April 27, 1988

ALFONSO J. ZIRPOLI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEFENDANTS' NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Filed May 6, 1988
[Caption Omitted In Printing]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on June 6, 1988, at 1:30 p.m., Courtroom 14 of the Court, located at 450 Golden Gate Avenue, San Francisco, Defendants LOUISE RENNE, San Francisco City Attorney, *et al.*, will move to vacate the judgment entered herein on the Third Cause of Action. The motion will be made on the ground that a case involving the central issues herein is now pending before the United States Supreme Court, and the additional ground that the order regarding the Third Cause of Action relies on erroneous legal analysis in Justice Grodin's concurring opinion in *Unger v. Superior Court*, 37 Cal.3d 612 (1984).

The motion will be based upon this notice, the supporting memorandum of points and authorities, the supporting declarations, the files herein, and such other and

further evidence and authorities as may be offered at or before the hearing on this matter.

DATED: May 6, 1988

Respectfully submitted,

LOUISE H. RENNE
City Attorney

DAVID BENJAMIN
Deputy City Attorney

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF WINSLOW CHRISTIAN IN SUPPORT OF DEFENDANTS' MOTION TO VACATE JUDGMENT

Filed May 6, 1988
[Caption Omitted In Printing]

I, Winslow Christian, declare:

1. I am the Senior Vice-President and Director of Litigation for the Bank of America.

2. From 1966 to 1983 I served as an Associate Justice of the California Court of Appeal, First Appellate District.

3. From 1959 to 1963 I served as Superior Court Judge for the County of Sierra.

4. From 1971 to 1973 I served as Executive Director of the National Center for State Courts; in that capacity I gained personal knowledge of judicial selection and tenure in many states. I learned that in certain states partisanship in judicial elections has damaged the reputation of the judiciary.

5. The state of California has a compelling interest in the independence and integrity of its judiciary. Even the mere appearance of improper influence over members of the judiciary erodes the public's confidence in its officials and institutions.

6. In my opinion, the independence of the California judiciary which is subject to election or public confirmation has depended upon the nonpartisan nature of

judicial elections. Permitting partisanship in the process of nominating, selecting and retaining judges would force judges to seek party endorsements. This process would create a risk of judicial candidates being tempted to promise to take party positions on legal issues which are pending or likely to arise. This harmful feature of partisanship in judicial elections has damaged the reputation of the judicial systems of certain other states known to me. The mere possibility of such political "deals" would undermine public confidence in the administration of justice.

7. Endorsements of judicial candidates by political parties differs from endorsements by other groups or individuals because political party endorsements tend to call for commitments on political and social issues conflicting with the overriding commitment a judge should hold to, i.e., fair and unbiased administration of justice.

8. In my opinion, therefore, partisan endorsements in nonpartisan judicial elections undermine the state's compelling interest in the independence and integrity of its judiciary.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of May, 1988 at San Francisco, California.

WINSLOW CHRISTIAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF PAT RUSSELL IN SUPPORT OF DEFENDANTS' MOTION TO VACATE JUDGMENT

Filed May 20, 1988
[Caption Omitted In Printing]

I, Pat Russell, declare:

1. I am a past member and president of the City Council of the City of Los Angeles. I served as a member of the City Council from December, 1969 through June, 1987. I served as President of the City Council from July, 1983 through June, 1987.

2. I served as a member of the Board of Directors of the National League of Cities from 1979 to 1981.

3. I served as president of the Southern California Association of Governments from 1982 to 1983.

4. I served as president of the League of California Cities from October, 1985 to October, 1986. During my term as president, the League of California Cities strongly supported the passage of Proposition 49 (ACA 7), which added art. II, § 6(b) to the California Constitution.

5. A party endorsement can carry great weight with the voters. If partisan endorsements are permitted in local elections, most candidates will be forced to seek and secure those endorsements to compete successfully for election.

6. Generally, candidates seek the endorsement of a party or are recruited by the party. Endorsements are

generally made by a vote of the central committee upon recommendation of the select few who have conducted private candidate interviews, at which they reviewed the candidates' positions on issues and other matters of importance to the committee.

7. Once an elected official has party support, the party could speak to her on any issues, and threaten her with the loss of party support. A blanket party endorsement can become a blanket disavowal.

8. The process of securing endorsements may create the appearance that the candidate made promises to take the party position on various matters in exchange for the endorsement. This would, I believe, undermine public confidence in local officials.

9. In a partisan environment, the loss of a party endorsement is much worse than the loss of an endorsement from a special interest group or an unofficial organization. Without the support of the party, an elected official loses her base of support and, ultimately, her office.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13 day of May, 1988, at Los Angeles, California.

PAT RUSSELL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF QUENTIN KOPP IN SUPPORT OF DEFENDANTS' MOTION TO VACATE JUDGMENT

Filed May 20, 1988
[Caption Omitted In Printing]

I, Quentin L. Kopp, declare:

1. I am, and have been since December 1, 1986, a member of the Senate of the State of California. I am the only independent member of the Senate. There is no independent member of the Assembly.

2. I served as a member of the Board of Supervisors of the City and County of San Francisco from January 8, 1972 to November 3, 1986, and as President of the Board from January 8, 1976 to January 8, 1978, and from June 1982 to January 1983.

3. If party endorsements are permitted in local elections, most candidates will be forced to seek, secure and maintain a party endorsement. In many communities, the endorsement of a political party carries great weight with the voters.

4. The process of seeking, securing and maintaining a party endorsement will seriously compromise the integrity and independence of local officials. If endorsements are permitted, the parties are likely to follow the same system used in the endorsement of partisan candidates at the present time. Under that system, a candidate is either

recruited by the party, or seeks the party endorsement. Generally, the county central committee of the party, or a committee or caucus of the county central committee, will interview the candidates. The interviews are typically conducted in private. The committee, or its designated representatives, then reviews the candidates' positions on the issues, their ability to raise campaign contributions, and other factors of relevance to the committee. The county central committee then decides upon the candidate it will endorse. The endorsed candidate will receive the benefit of voters' lists, party organization, slate mailings and other forms of assistance usually associated with partisan elections.

5. This process of party endorsements and support will compromise the independence of local officials and undermine public confidence in the fair and unbiased administration of local affairs. It will create the appearance, if not the fact, that endorsed candidates have made promises to vote the party line on local issues. The fact that most endorsement interviews are conducted in private only serves to justify the fear that improper *quid pro quo* agreements are made or required as a condition of the party's endorsement. Like large campaign contributions, party endorsements will undermine the public's confidence in their local officials, because the officials will be perceived as beholden to party interests rather than to the voters themselves.

6. Endorsements by the ballot-qualified political parties are different from endorsements by unofficial parties and special interest groups, because the very purpose of creating nonpartisan offices is to minimize or eliminate the party's influence over local officials. In addition,

unofficial parties and special interest groups do not create a risk of partisan elections. When nonpartisan special interest groups like the Sierra Club, or unofficial groups like the Americans for Democratic Action, endorse candidates, they do no harm to the nonpartisan nature of local office. Partisan endorsements, however, create the risk that political parties will once again dominate local affairs – foreclosing opportunities to political newcomers, demanding adherence to the party line from those it supports, and compromising the voters' legitimate interest in the fair, impartial and independent administration of local government.

7. The prohibition against official party participation in nonpartisan local elections is designed to protect the independence and responsiveness of local offices. The nonpartisan local office was a cornerstone of the populist reform of the Hiram Johnson era. That this reform was eminently successful in protecting local governments from the stranglehold that official parties had historically exerted, should not be forgotten. Our history teaches that the concentration of too much power in party organization leads to bossism. Bossism in turn undermines both public confidence in their governments and the ability of governments to enlist the most talented and creative lawmakers and administrators.

8. Hence the nonpartisan nature of local offices serves an important public interest. Problems are first encountered and addressed at the local level. Local governments provide the foundation for legislative and executive solution to public problems. The ability of local governments to evolve and their capacity to develop new and innovative responses to public problems depend

directly upon the ability of people from all philosophic persuasions to gain public office. Participation by official parties in local elections will make it more difficult for independent thinkers who are not willing to toe the party line to be elected to office. The public is vitally interested in the ability of independent, creative office holders at the local level.

9. My experience is that official endorsements in local elections will destroy the nonpartisan nature of local offices. As a result the people will be deprived of a valuable asset in promoting a vital and responsive democracy.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of May, 1988 at Sacramento, California.

QUENTIN L. KOPP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF RICHARD MOUNTJOY
IN SUPPORT OF DEFENDANTS' MOTION
TO VACATE JUDGMENT

Filed May 20, 1988
[Caption Omitted In Printing]

I, RICHARD MOUNTJOY, DECLARE:

1. I am, and have been a member of the California Assembly since 1978. I serve as a member and vice-chair of the Assembly Elections, Reapportionment and Constitution Amendments Committee and the Government Organization Committee, among others.

2. I was the Mayor and member of the City Council for the City of Monrovia from 1968 to 1976.

3. I was the author of Proposition 49 (ACA 7), which added Art. II, section 6(b) to the California Constitution in 1986.

4. To permit party endorsements in nonpartisan races is a most expedient way to set the wheels in motion on the old party machines.

5. A candidate either seeks a party endorsement or is recruited by the party. Traditionally, candidates seeking party endorsements would appear before the executive committees of party central committees, the central committees themselves and in some areas, specially created endorsement caucuses. The committee would then review the candidates' positions on the issues, and other matters of importance to the committee. Consequently, a party

endorsed candidate was either a long time party activist, or a newcomer who demonstrated a willingness to vote the party line.

6. The major reason for a prohibition on party endorsements is to keep partisan politics out of local government. Local government is service oriented. Decisions on whether a contract should be approved, what streets should be repaired, what programs should be funded, what permits should be granted, or who should get key appointive positions should not be based on whether those involved are active with the local party or on how the local party would like the matter to be resolved.

7. Local government is the grassroots of America. At the state and federal levels access to the system by individuals is more restricted and the issues are more complicated and philosophical in nature. In state and federal government, parties serve as a means of entry into the political structure by the average citizen. This is unnecessary, and in fact harmful at the local level where decisionmaking based on party support can be disastrous.

7. Parties are unique. Their power base is much broader than unofficial organizations and special interest groups, and not single issue oriented. An endorsement by a party would have a much greater impact on voters than would the Sierra Club, for example, but would be less informative as to where the candidate stands on local issues. Name recognition is often weak at the local level. Consequently, solicitation by the party for support of its slate of candidates among those registered with that

party would be more significant than a single issue organization's solicitation for support to its members.

8. Lifting the ban on party endorsements for nonpartisan offices is the equivalent to presenting parties with a mandate to control local government. Officeholders would be accountable first to their party and then to their constituency.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of May, 1988 at Arcadia, California.

RICHARD MOUNTJOY

[Proof Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DECLARATION OF ARLO HALE SMITH

Filed May 23, 1988
[Caption Omitted In Printing]

I, ARLO HALE SMITH, say:

1. I am now, and have been since June, 1980, an elected member of the Democratic County Central Committee of San Francisco. I am also a member of the Bay Area Rapid Transit District (BART) Board of Directors, and have held such office since 1986. My father is now, and has been since 1979, District Attorney of the City and County of San Francisco. Both BART Director and District Attorney are local nonpartisan offices.

2. In the course of my 1986 campaign for BART Board, and through work on my father's 1979, 1983, and 1987 campaigns for District Attorney, I have become personally familiar with the endorsement practices of numerous organizations in San Francisco, which endorse the election of candidates to the offices of either or both BART Director and/or District Attorney. It has been my personal experience that virtually all of the organizations which make such endorsements do so only after the organization in question, or its executive committee or political action committee, has either interviewed the candidate, or received written responses to a questionnaire from the candidate, or both, and that such organizations seldom, if ever, make unsolicited endorsements. The organizations which follow such endorsement practices

would include the San Francisco Labor Council, the San Francisco Black Leadership Forum, the Frederick Douglass Symposium, the San Francisco League of Environmental Voters, the San Francisco Bar Association, the Chinese American Democratic Club, the Alice B. Toklas Lesbian/Gay Democratic Club, the Mexican American Political Association, the San Francisco Chapter of the Sierra Club, the National Woman's Political Caucus, and the editorial board of San Francisco's major newspapers, the Examiner, the Chronicle and the Progress. Some of the foregoing organizations even extract promises from candidates as a precondition for endorsement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 23, 1988

ARLO HALE SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, *et al.*,

Plaintiffs

v. C 87 4724 AJZ

LOUISE RENNE, San Francisco City Attorney, *et al.*,

Defendants

ORDER DENYING DEFENDANTS' MOTION TO VACATE JUDGMENT

Filed June 9, 1988

On April 27, 1988, this court granted plaintiffs' motion for summary judgment as to the third cause of action, finding that Article II, Section 6(b) of the California constitution, which prohibits partisan endorsements in non-partisan elections, is unconstitutional. Defendants subsequently filed a motion to vacate that judgment, which came on for hearing on June 6, 1988.

Defendants have failed to present sufficient ground for vacating this court's judgment. The court need not stay the present case during the pendency of the appeal in *San Francisco County Democratic Committee, et al. v. Eu*, 826 F.2d 814 (9th Cir. 1987), because that case does not involve the same issues as the present case. Although the Supreme Court's ruling in *Eu* might include some analysis that is relevant to this case, it will not provide a

definitive answer to the questions raised by plaintiffs' third cause of action.

Further, this court has considered the asserted weaknesses in Justice Grodin's opinion in *Ungar v. Superior Court*, 37 Cal.3d 612 (1984). Despite defendants' arguments, this court is persuaded that its original ruling as to plaintiffs' third cause of action is proper.

At the hearing on the motion to vacate, defendants' counsel requested that the court stay its ruling while defendants pursue an immediate appeal. Defendants have failed to demonstrate that they are entitled to a stay. This court has held that plaintiffs are entitled to endorse candidates in non-partisan elections. Defendants have not shown good cause for the court to preclude plaintiffs from exercising this right during the pendency of an appeal.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion to vacate judgment and defendants' request for a stay are denied.

Dated: June 9, 1988

Alfonso J. Zirpoli
United States District Judge

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

LOUISE H. RENNE
City Attorney and
Counsel of Record
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
(415) 554-4213

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the First Amendment prohibit the determination by the people of the State of California that a ban on official party endorsements in local, judicial and school board elections is necessary to preserve nonpartisanship in those offices?

LIST OF ALL PARTIES

Petitioner Louise H. Renne is the City Attorney for the City and County of San Francisco. Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. As such, it is responsible for conducting federal, state and local elections within its jurisdiction. The remaining petitioners, sued in their official capacities, include the Mayor and the Registrar of Voters of the City and County of San Francisco. Petitioner Board of Supervisors, also sued in its official capacity, is the legislative body of the City and County. Although the validity of a provision of the California Constitution is at issue in this case, neither the State of California, nor any of its officers, were served or appeared.

Respondents Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Max Woods, Peter Johnson, Robert Gebert, and Terence Faulkner are residents and registered voters of the City and County of San Francisco. Respondents Geary, Faulkner, Woods, Silvestri and Mark are members of various county central committees. Respondent Election Action identifies itself as an organization dedicated to placing measures on the ballot by initiative, and to campaigning for and against ballot propositions. Respondent Sudi Trippet is the coordinator of Election Action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. INTRODUCTION	7
II. ARTICLE II, SECTION 6(b) SERVES CALIFORNIA'S COMPELLING INTEREST IN PRESERVING NONPARTISAN LOCAL ELECTIONS	8
III. ARTICLE II, SECTION 6(b) IS NARROWLY TAILORED TO SERVE CALIFORNIA'S INTEREST IN NONPARTISANSHIP	20
A. Section 6(b) Is Not Underinclusive	21
B. Section 6(b) Is Not Overinclusive	25
C. The Record In This Case Shows That Section 6(b) Is Necessary To Preserve Nonpartisanship	26
D. No Less Restrictive Alternatives Are Available To Preserve California's Interest In Nonpartisanship	29

TABLE OF CONTENTS – Continued

Page

E. Section 6(b) Is Not Overbroad On The Ground That It Imposes A Total Ban On Party Activity. 33

IV. ARTICLE II, SECTION 6(b) DOES NOT DENY EQUAL PROTECTION 35

V. CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Reno 452 F.Supp. 1166 (S.D.Fla. 1978) 20

Anderson v. Celebrezze 460 U.S. 780 (1983) 11

Austin v. Michigan Chamber of Commerce 110 S.Ct. 1391 (1990) 6, 22, 23, 24, 25

Buckley v. Valeo 424 U.S. 1 (1976) 17, 24, 33

Civil Service Commission v. National Association of Letter Carriers 413 U.S. 548 (1973) . . . . . *passim*

Concerned Democrats v. Reno 458 F.Supp. 60 (S.D.Fla. 1978) 30, 31

Eu v. San Francisco Democratic Central Comm. 489 U.S. 214 (1989) 19, 20

FEC v. Massachusetts Citizens for Life, Inc. 479 U.S. 238 (1986). 22, 24

FEC v. National Right to Work Committee 459 U.S. 197 (1982) 26

First National Bank of Boston v. Bellotti 435 U.S. 765 (1978) 5, 19, 24

Mark v. Corwin 914 F.2d 1249 (9th Circuit 1990) 32

Mark v. Corwin 924 F.2d 175, 1991 WL 7943 (Jan. 30, 1991) 32

Munro v. Socialist Workers Party 479 U.S. 189 (1986) 29

Oregon v. Mitchell 400 U.S. 112 (1970) 11

Paris Adult Theater I v. Slaton 413 U.S. 49 (1973) 29

Police Department v. Mosely 408 U.S. 92 (1972) 36

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Sims 377 U.S. 533 (1964) 11

Stevenson v. State Board of Elections 794 F.2d 1176 (7th Cir. 1986) 30, 35

State v. District Court, 122 Mont. 464, 206 P.2d 166 (1949) 31

Storer v. Brown 415 U.S. 724 (1974) 19, 35

Unger v. Superior Court 102 Cal.App.3d 681 (1980) .. 9, 31

Unger v. Superior Court 37 Cal. 3d 612 (1984) ... 10, 26, 28

STATUTES

United States Constitution

Article IV, section 4 ..... 3, 10

1st Amendment 3, 4, 24, 32, 36

10th Amendment 10, 11

14th Amendment 35

United States Code

5 U.S.C. section 7324(a)(2) 17

28 U.S.C. section 1254(1) 2

28 U.S.C. section 1331 2

28 U.S.C. section 1343 2

42 U.S.C. section 1983 2

42 U.S.C. section 1985 2

California Constitution

Article II, section 2¾ 9

Article II, section 6 ..... 2, 9

Article II, section 6(a) 5, 6, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Article II, section 6(b) ..... *passim*

California Elections Code

Section 35 9

Section 37 ..... 30, 34

Section 605 ..... 15, 23

Section 6401.5 ..... 30, 32

Sections 6430 *et seq.* 15, 23

Section 6430.5 9

Sections 8500-8945 9

Sections 9000-9510 9

Sections 9600-9745 9

Sections 9750-9855 9

Section 10000 ..... 15, 23

Section 10007 15

Section 10010.5 ..... 15, 23

Section 10012 ..... 30, 32

Section 10200.5 30

Section 10207 30

Section 10214 30

California Revenue and Taxation Code

Sections 18701 *et seq.* 15, 23

TABLE OF AUTHORITIES – Continued

Page

Acts of the California Legislature

Statutes of 1911, Extra Session, chapter 17, section 3 9

Statutes of 1913, chapter 690, section 5 9

Florida Statutes Annotated

Section 105.071 10

Montana Code Annotated

Section 13-35-231 10

Section 3-10-201(4) 10

South Dakota Codified Laws Annotated

Section 12-9-2 10

MISCELLANEOUS

The Federalist (Cooke ed. 1981) 11

Friedman, *Reflections Upon the Law of Political Parties* (1956) 44 Cal.L.Rev. 65 16

Lee, E., *The Politics of Nonpartisanship* (1960) 27

Owens, J., E. Constantini, and L. Wechsler, *California Politics and Parties* (1969) 12

Tribe, L., *American Constitutional Law* (2d ed. 1988) 11

Argument In Favor of Proposition 49, California Ballot Pamphlet, Primary Election, June 3, 1986 14

Statement of Assemblyman Richard L. Mountjoy as to Background and Purpose of Proposition 49, 1985 ..... 13, 19

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Ninth Circuit (Pet.App. A, at p. A-1) is reported at 911 F.2d 280.

The initial Ninth Circuit opinion (Pet.App. B, at p. A-67) is reported at 880 F.2d 1062. The order granting the petition for rehearing and setting a rehearing *en banc* (Pet.App. C, at p. A-113) is reported at 895 F.2d 1230.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) (Pet.App. D, at p. A-114) is reported at 708 F.Supp. 278.

JURISDICTION

Respondents brought this suit on September 11, 1987, in the Northern District of California, invoking federal jurisdiction under 42 U.S.C. sections 1983 and 1985. The District Court's jurisdiction was based on 28 U.S.C. sections 1331 and 1343. On April 27, 1988, the District Court issued its judgment in favor of respondents on their third cause of action, the subject of the instant proceeding. Pet.App. D, at p. A-114.

The Court of Appeals for the Ninth Circuit entered a decision reversing the Northern District's judgment on July 24, 1989. Pet.App. B, at p. A-67. Rehearing *en banc* was granted on February 6, 1990. Pet.App. C, at p. A-113. On August 14, 1989, the *en banc* court affirmed the District Court's judgment. Pet.App. A, at p. A-1.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

1. Article II, section 6, of the California Constitution provides as follows:

> (a) All judicial, school, county, and city offices shall be nonpartisan.
>
> (b) No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

2. Article IV, section 4, of the United States Constitution (the Guarantee Clause) provides as follows:

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

3. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Respondents submitted various candidates' statements for publication in the San Francisco voters pamphlet for the June 2 and November 3, 1987 municipal elections. Pet.App. A, p. A-2. The Registrar of Voters refused to publish portions of the statements which referred to endorsements made by the county central committees of ballot-qualified parties. *Id.*

On September 11, 1989, respondents filed suit against the City and various City officials, alleging three causes

of action. J.A. 2. At issue here is the third cause of action, which alleged that Article II, section 6(b) of the California Constitution violates the First Amendment. J.A. 4-5.

Respondents' motion for partial summary judgment on the third cause of action was granted by the Hon. Alfonso J. Zirpoli, by order dated April 27, 1988. Pet.App. D, p. A-114. The City's subsequent motion to vacate the judgment was denied. J.A. 40. The City filed its notice of appeal on June 22, 1988. J.A. 1.

On June 24, 1989, a three-judge panel of the Ninth Circuit issued a decision upholding the constitutionality of section 6(b). Pet.App. B, p. A-67. The Ninth Circuit granted a rehearing *en banc* at respondents' request on October 13, 1989. Pet.App. C, p. A-113. The eleven-judge *en banc* court issued its decision on August 14, 1990, reversing the panel's decision. Pet.App. A, p. A-1.

SUMMARY OF ARGUMENT

Eighty years ago, California committed itself to nonpartisanship in its local, school and judicial elections. The provision of law at issue in this case, Article II, section 6(b) of the California Constitution, is vital to that commitment.

Article II, section 6(b) of the California Constitution provides:

> No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

Section 6(b) was adopted as the companion to Article II, section 6(a) of the California Constitution, a provision not challenged in this litigation:

> All judicial, school, county, and city offices shall be nonpartisan.

The origins of section 6(a) lie in the 1911 legislation that first established nonpartisan offices in California.

The history of these provisions and the record in this case demonstrate that sections 6(a) and 6(b) serve the same purposes: to keep control of local government and California's judiciary directly in the hands of the people and out of the hands of those who run political parties. Parties have special state-conferred advantages that give them the potential to disproportionately influence local officials and judges if parties are allowed to endorse these candidates for nonpartisan office.

By prohibiting such endorsements, Section 6(b) promotes the impartial administration of the law, as well as the appearance of impartiality. Section 6(b) also furthers the state's interest in fair and effective government and in keeping local government service open to the independent-minded. This Court has long recognized that these interests are compelling. *See Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564-67 (1973); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

Section 6(b) is narrowly tailored to serve these interests. First, the provision is not underinclusive for failure to ban endorsements by nonpartisan organizations in local and judicial elections. Under California's electoral system, only official, ballot-qualified parties receive the

special statutory benefits in association with partisan elections that can translate into undue influence in nonpartisan elections. *See Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (1990).

Second, section 6(b) is not overinclusive for banning endorsements by official parties which historically have not been influential in California elections. As the *Austin* Court emphasized, a state may properly regulate the speech of entities with the *potential* to unduly influence the political process, when that potential arises from state-conferred advantages. Under California's election laws, all official parties have that potential.

Third, the absence of proof of any harmful effects from party endorsements before section 6(b) was enacted does not show that the measure is unnecessary. The lack of evidence reflects a simple fact: party endorsements in nonpartisan races occurred only sporadically before section 6(b) was adopted, because it was generally understood that section 6(a) alone proscribed them.

Fourth, while other statutory safeguards of nonpartisanship exist, without an endorsement ban these purportedly "less drastic alternatives" do not sufficiently protect the interests served by section 6(b).

Finally, section 6(b) is not overbroad on the ground that it imposes an absolute ban on party support in nonpartisan races. Given the special advantages the state gives parties in the partisan arena, only a ban of section 6(b)'s scope will eliminate the danger that parties could again exert control over judges and local government. Having already experienced the unhappy consequences of such control once in this century, California is entitled,

within our federalist system, to take the steps necessary to insure that this history not be repeated.

ARGUMENT

I. INTRODUCTION

This is a case about political power. At stake is whether local government and judges in California are to be controlled by the people or by those who run political parties.

The citizens of California have voted their choice. Their constitution makes local and judicial elections nonpartisan and bans party endorsements in nonpartisan races. To hold that the First Amendment forbids a state these choices would be a blow to citizen government and to basic notions of federalism.

The people of California adopted nonpartisanship for the most compelling reasons. They wanted to insure the fullest measure of citizen participation and judicial independence. They knew from their own history, and from experience in certain Midwestern and Eastern cities, that party machines had operated most perniciously at the local level. Parties have state-wide and national networks; they have special advantages under state law. Californians knew that with these advantages, parties could close the field in local elections to those who will not toe the party line. And Californians did not want their judges pondering party positions when making legal decisions.

In enacting Article II, section 6(b) of the California Constitution, the voters recognized that party endorsements and nonpartisan elections are incompatible. So long as official parties, with their competitive political advantages, can endorse, parties will have the means to dominate City Hall as they did at the turn of the century. Particularly in counties which have large, one-party majorities, the party leaders' pick for judge or school board will likely decide who can compete effectively for office.

The threat to California's independent brand of local government is clear. The threat to the impartial administration of justice, and to public confidence in California's judiciary, is even clearer. Section 6(b) is the people's answer to those threats.

The promise of our federalist system is that the states serve as the laboratories for diverse democratic forms. To hold that the people of California cannot adopt a measure needed to assure the viability of nonpartisanship would betray that promise. Nothing in the First Amendment commands such a result.

II. ARTICLE II, SECTION 6(b) SERVES CALIFORNIA'S COMPELLING INTEREST IN PRESERVING NONPARTISAN LOCAL ELECTIONS

In the early years of this century, party machines held a tight grip on local government in California. The Progressive movement that arose in reaction initiated numerous governmental reforms. Primary among them was the institution of nonpartisanship in judicial, school

and local elections.[1] In 1972, this commitment took its modern form under Article II, section 6 [now 6(a)] of the California Constitution: "Judicial, school, county and city offices shall be nonpartisan."[2]

In 1980, the California Court of Appeal confirmed the widespread understanding that under Article II, section 6, party endorsements were unlawful in nonpartisan elections. *See Unger v. Superior Court*, 102 Cal.App.3d 681 (1980) (*"Unger I"*). Four years later, however, the California Supreme Court disapproved *Unger I*, holding that endorsements in judicial elections were permissible

---

[1] California's direct primary act of 1911 provided for nonpartisan nomination papers for judicial and school offices. Cal. Stats. of 1911, Ex.Sess., ch. 17, § 3, p. 69.

California's direct primary act of 1913 provided that "[i]n the case of a nomination paper for any candidate for a judicial office, school office, county office, or township office, . . . *no such nomination paper . . . shall contain the name of any political party, or any signer thereto, nor shall the candidate be referred to as a candidate for the nomination of any party.* [Emphasis added.]" Cal. Stats. of 1913, ch. 690, § 5, p. 1388.

In 1926, the prohibition on party nominations of candidates for nonpartisan offices was incorporated in Article II, section 2¾ of the California Constitution.

[2] "Nonpartisan offices" are "office[s] for which no party may nominate a candidate." Cal. Elections Code § 37. Section 35 of the California Elections Code defines "political party" to include those parties that have qualified for the state's primary ballot: the Democratic Party, Cal. Elections Code §§ 8500-8945, the Republican Party, Cal. Elections Code §§ 9000-9510, the American Independent Party, Cal. Elections Code §§ 9600-9745, the Libertarian Party (no separate Elections Code provisions), and the Peace and Freedom Party, (Cal. Elections Code §§ 9750-9855. Ballot-qualified status may be lost when party registration "falls below one-fifteenth of one percent of statewide registration." Cal. Elections Code § 6430.5.

because section 6 did not specifically prohibit them. *See Unger v. Superior Court*, 37 Cal.3d 612 (1984) ("*Unger II*").[3]

The people of California reacted swiftly. At the next general election, held in June of 1986, the voters overturned *Unger II* by adopting the endorsement ban at issue in this case. Cal. Const., Art. II, § 6(b).[4] The voters understood that a ban on party endorsements was essential to serve the interests of independence, impartiality and effective government which underlie nonpartisanship.[5]

The people of California enacted section 6(b) under the guarantees of the Tenth Amendment and Article IV, section 4 of the United States Constitution. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public

---

[3] At issue in *Unger II* was whether the Republican Party had violated section 6 by endorsing and supporting the nonconfirmation of three justices of the California Supreme Court in the 1982 election.

[4] As part of the 1986 ballot proposition that added section 6(b) to the California Constitution, section 6 was renumbered as section 6(a), and the word "All" was added as the first word of the provision.

[5] A few other states have made similar choices. Florida prohibits political parties from endorsing, supporting or assisting candidates in judicial campaigns. Fla.Stat.Ann. § 105.071 (West Supp. 1991). Montana also prohibits political parties from endorsing or contributing to the campaigns of judicial candidates or justices of the peace. Mont.CodeAnn. §§ 13-35-231, 3-10-201(4) (1989). And South Dakota prohibits parties from endorsing or nominating judicial candidates. S.D. Codified Laws Ann. § 12-9-2 (1982).

offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J.). The Guarantee Clause and the Tenth Amendment require that courts "respect the state's most fundamental structural choices as to how its people are to participate in their own governance." L. Tribe, *American Constitutional Law* 398 (2d ed. 1988). Admittedly, these provisions do not immunize a state's regulation of its political processes from scrutiny. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 582 (1964). But the constitutional origins of such regulation call for courts to balance the interests of federalism against any interest impaired by the regulation. *See generally, Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Quite apart from the constitutional dimensions of the state's interest in section 6(b), both history and the record in this case demonstrate the compelling nature of that interest.

Nonpartisanship in local government has deep historical roots. The framers of the Constitution viewed "factionalism" – their term for partisanship – as one of the most serious evils they sought to remedy. *The Federalist*, No. 10 (Madison) 56-65 (Cooke ed. 1981). The framers saw the problem as most acute in local government, where the parties exercised more direct influence than in the national government they were proposing. *Id.*, No. 10 at 63. The framers were concerned about the tendency of parties and factions to narrow the allegiances of their adherents, deflecting them from consideration of the general welfare in favor of more parochial party goals. *Id.*, No. 10 at 57; No. 76 at 511.

The fears of the framers were confirmed in the early part of this century, when cities such as San Francisco

were plagued by party bossism. Nonpartisan reforms were the result:

> The most important of the civic reform movements took place in San Francisco, where muckraking newspapermen joined forces with business and professional groups to battle one of the most ruthless and graft-ridden city machines in the state. The Union Labor party, under the direction of Abe Ruef, elected its own mayor, captured the police force, and used utilities rates as a means of political payoff. After capturing city hall in 1901, Boss Ruef, through the mayor's office, began a five-year orgy of bribery, blackmail and extortion. Reformers, thoroughly disgusted with party politics and stymied at the polls, turned to the courts. The ensuing graft prosecution, 1906-1909, provided the opponents with the ammunition they needed to start a state-wide campaign against political corruption.

J. Owens, E. Constantini, and L. Wechsler, *California Politics and Parties*, p. 33 (1969).

Ruef's prosecutor, Hiram Johnson, became governor of California in 1910. The next year, California took the first step on the road to nonpartisanship. The 1911 statute creating nonpartisan judicial and school elections, and its statutory successors, were designed to keep parties from reasserting their control over local government and the judiciary. *See* fn. 1 *ante*.

The legislative history of section 6(b) makes clear that banning party endorsements in nonpartisan races was intended to serve precisely the same purpose. As the author of section 6(b) emphasized, nonpartisanship was responsible for the "distinctive quality of the California

political process" as compared to local governments "[i]n many Mid-western and Eastern states." Statement of Assemblyman Richard L. Mountjoy as to Background and Purpose of Proposition 49, 1985, quoted in the Ninth Circuit panel decision, Pet.App. B, p. A-103 fn. 32. Without section 6(b), Mountjoy stated, "political parties will dominate our historically nonpartisan judicial, county and local elections." *Ibid.*

And this message went directly to the voters who enacted section 6(b). The proponents of the measure – Proposition 49 on the June, 1986, California ballot – argued in the ballot pamphlet:

> To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN – NOT BECAUSE THEY ARE IMPARTIAL – BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?
>
> WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN – NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW – BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?
>
> Californians do not want their judges to become beholden to political parties.
>
> UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT.

> Local officeholders support this amendment and are equally concerned that partisan electioneering will harm decision-making at the local level. They are concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines.
>
> Local officeholders do not want to have to check with the party bosses before they make decisions important to their constituents!

Argument In Favor of Proposition 49, California Ballot Pamphlet, Primary Election, June 3, 1986, p. 26, quoted at Pet.App. A, p. A-43 fn. 35.

Like the history of section 6(b), the record in this case demonstrates that the endorsement ban serves the state's interests in independent local government, and in impartial justice and in the appearance of impartial justice.[6] The record reflects the reality that party endorsements are not unilateral recommendations issued by a disinterested central committee; rather they are the result of trade-offs and promises exchanged between the candidates and the parties. J.A. 32, 35. A party-endorsed candidate is either a long-time party activist or a newcomer who is willing to vote the party line. J.A. 35-36. The endorsed candidate receives the benefits of voters' lists, organized party support, slate mailings and other forms of assistance usually associated with partisan elections. J.A. 32.

---

[6] The state's interests in preserving confidence in the California judiciary are discussed at greater length in the brief of Amicus California Judges Association.

State law gives ballot-qualified parties numerous advantages in these endeavors. In addition to the influence and funding that arise from the official parties' right to control access to state primary elections, *see* Cal. Elections Code §§ 6430 *et seq.*, official parties receive public funds to pay for the expenses associated with the preparation and conduct of elections, including primaries. Cal. Elections Code § 10000. County central committees may submit party contributor envelopes or one-page solicitation letters to be mailed at public expense by the county clerk with the sample ballots. Cal. Elections Code § 10010.5.[7] The state collects contributions of up to 25 dollars on behalf of official parties as an option included on all California personal income tax returns. Cal. Revenue and Taxation Code §§ 18701 *et seq.*

California has given the parties these advantages to better enable them to fulfill their statutory role in the state's electoral system. That role is to conduct party primaries and campaigns for statewide office. As one commentator has noted:

> In statutory contemplation California party organs have been left with one major role – to campaign for the general election success of the party nominees selected by the voters at the primary. This role, according to statutory theory,

---

[7] In addition, county clerks are required to prepare at public expense sample ballots for political parties in primary elections, and mail those ballots to the voters. Cal. Elections Code § 10007. County clerks must also furnish state and county central committees with printed indices of registered voters without charge. Cal. Elections Code § 605.

> they perform under direction of the state and county central committees.

Friedman, *Reflections Upon the Law of Political Parties* (1956) 44 Cal.L.Rev. 65, 69.

Thus, California has opted for a system that places parties at the center of the statewide political system. If parties can endorse in nonpartisan elections, the danger is clear: they can convert the statutory advantages of their statewide role to disproportionate influence on local government and judicial officeholders, undermining California's system of nonpartisanship. Candidates will be subject to various "litmus tests" of their commitment to party platforms. *En banc* opinion, Alarcon, J., diss., Pet.App. A, p. A-59. Once the endorsed candidate is elected, the party can threaten the officeholder with the loss of party support. J.A. 30. The parties will be as directly and intimately involved in controlling local candidacies as if they actually controlled the nomination process. J.A. 28, 29.

Local government plays a unique role among government institutions. It affects the lives of the people most regularly and most directly. Local government issues the building permits, fixes the potholes and installs the "Slow – Children At Play" signs in front of schools. When a citizen asks the mayor, the city council or the school board to provide any of these basic services, the citizen should not have to worry that the request will be discounted or ignored because he or she is a Democrat rather than a Republican, or an Independent rather than a Democrat.

Many problems are first addressed at the local level, and local responses often form the foundation for state

and federal solutions. J.A. 32-33. Local government's capacity to address those problems depends upon its ability to attract to public office independent thinkers who are not willing to follow the party line just to be elected. J.A. 33-34. Participation by political parties in local elections will make it more difficult for such people to be elected to office. J.A. 34.

The interests underlying section 6(b) are the same as those found compelling in *Letter Carriers, supra*. In *Letter Carriers*, the Court upheld provisions of the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibited federal employees from engaging in partisan political activities. Although *Letter Carriers* addressed restrictions on speech by federal employees, its reasoning has been applied to regulations governing private individuals and nongovernment agencies. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

The Court in *Letter Carriers* identified several governmental interests justifying the restrictions imposed upon First Amendment activities. 413 U.S. at 564-67. The first interest was the impartial administration of government. The Court recognized as "fundamental . . . that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party." *Id.*, at 564-65.

The Hatch Act prohibited a wide range of political expression in order to protect and preserve that impartiality:

> A major thesis of the Hatch Act is that to serve this great end of Government – the impartial

> execution of the laws – it is essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. [Citations omitted.]

Id., at 565. Further, avoiding the appearance, as well as the fact, of federal employees practicing political justice was recognized as a compelling consideration, "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.*

In addition, the Court recognized the need to protect good government by shielding the employees themselves from the effects of partisan pressures:

> A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. [Citations omitted.]

Id., at 566. A corollary to that concern was the conviction that partisan influence and patronage ought not to be allowed to convert the rapidly expanding Government work force into a powerful and perhaps corrupt political machine. *Id.*, at 565.[8]

---

[8] Again, the congruity between this concern and what motivated the author of section 6(b) is striking:

(Continued on following page)

This Court has described the interests identified in *Letter Carriers* as "interests of the highest importance." *Bellotti, supra,* 435 U.S. at 789. Because the same interests are at stake here, there can be no doubt that they are compelling.

The compelling nature of the state's interest in nonpartisanship distinguishes this case from *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214 (1989). In *Eu*, this Court affirmed a decision striking down a ban on party endorsements in *party primaries* in California. The Court was persuaded by the fact that the primary was established as a way for the party and its members to choose their candidates for *partisan* office. 489 U.S. at 227, citing *Storer v. Brown*, 415 U.S. 724, 735 (1974). The Court reasoned that the state had no compelling interest in restricting a party's ability to communicate with its members concerning *its own decision-making process*. *Id.*, at 228.

Unlike this case, *Eu* did not involve the state's interest in the form of its judiciary and local government. In

---

(Continued from previous page)

> The greatest danger in injecting political parties into the local elective process will be a not-so-subtle creation of a patronage network. The power of the state party leaders will no doubt increase greatly, opening the door for a centralized partisan power authority of incredible financial dimensions. In many Midwestern and Eastern states, the city, state, and county jobs are brokered by the political central committees.

Statement of Assemblyman Richard L. Mountjoy, quoted in panel opinion, Pet.App. B, p. A-103 fn. 32.

Eu, the Court found that the ban on pre-primary endorsements burdened the right of political parties to govern themselves as they see fit, because a partisan primary is by definition *their* election. A nonpartisan election, however, is not a device for settling differences within a party. Section 6(b) promotes the state's very different interest in preserving the nonpartisan structure of its government. *Eu* did not consider those interests and does not control this case.[9]

III. ARTICLE II, SECTION 6(b) IS NARROWLY TAILORED TO SERVE CALIFORNIA'S INTEREST IN PRESERVING NONPARTISANSHIP

As discussed above, allowing political parties to make endorsements will give them a central role in nonpartisan elections. Winslow Christian, a former California trial judge, Associate Justice of the California Court of Appeal, and Executive Director of the National Center for State Courts, testified that party endorsements were incompatible with nonpartisan judicial elections:

> In my opinion, the independence of the California judiciary which is subject to election or public confirmation has depended upon the nonpartisan nature of judicial elections. Permitting partisanship in the process of nominating, selecting and retaining judges would force judges to seek party endorsements. This process

[9] *Abrams v. Reno*, 452 F.Supp. 1166 (S.D.Fla. 1978), *aff'd*, 649 F.2d 342 (5th Cir. 1981), cited by respondents, is distinguishable for the same reasons as *Eu*. In *Abrams*, the district court struck down a Florida statute prohibiting a state or county central committee from endorsing a candidate in the party primary.

> would create a risk of judicial candidates being tempted to promise to take party positions on legal issues which are pending or likely to arise. This harmful feature of partisanship in judicial elections has damaged the reputation of the judicial systems of certain other states known to me. The mere possibility of such political "deals" would undermine public confidence in the administration of justice.

J.A. 27-28. Justice Christian's testimony was uncontroverted. *En banc* opinion, Alarcon, J., diss., Pet.App. A, p. A-63. And history demonstrates the damaging impact on the independence of the judiciary and the integrity of local officials that resulted from party control. *Ibid*. True nonpartisanship is not achieved simply through the absence of party labels on ballots; it requires that judges and local officials enforce the law and execute the programs of government without indebtedness to any political party. Particularly in light of the special advantages conferred by the state upon official parties, endorsements put parties at the center of local and judicial elections, thereby eroding that impartiality.

Respondents advance five arguments that section 6(b) is not narrowly tailored. Each of these arguments is flawed.

A. Section 6(b) Is Not Underinclusive

Respondents first assert that section 6(b) is underinclusive because it permits endorsements by nonpartisan entities which can also control judges and local officials. Respondents argue that there is no difference between these endorsements and party endorsements.

There are three answers to this claim. First, by definition, endorsements by non-parties do not threaten nonpartisanship. Second, there is no history of bossism or domination of local government by nonpartisan organizations in California, as there has been by political parties. Third, official parties are different from nonpartisan organizations in that the parties occupy a special position in the political arena by virtue of state-conferred advantages. This Court has previously held that such advantages are a permissible basis for differential restrictions on speech in elections. *See Austin, supra.*

In *Austin*, the Court upheld a state prohibition on corporations using general treasury funds in connection with state candidate elections. The Court held that the Michigan restrictions were justified by the unique, state-conferred legal and economic status that corporations enjoy:

> State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

110 S.Ct. at 1397, quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)("*MCFL*").[10]

---

[10] Significantly, the Court held that these special advantages justified restrictions not only on campaign contributions,

(Continued on following page)

Ballot-qualified political parties in California also possess unique legal and political advantages, conferred upon them by the state. *See* discussion at p. 15 *ante*. Primary among these benefits are (1) the power and fundraising capability afforded by the parties' guaranteed access to the state ballot, *see* Cal. Elections Code §§ 6430 *et seq.*; (2) the public subsidies official parties receive to prepare and conduct elections, Cal. Elections Code § 10000; (3) the parties' access to voter lists, Cal. Elections Code § 605; (4) the parties' right to send party contributor envelopes or solicitation letters to voters at public expense, Cal. Elections Code § 10010.5; and (5) the state's collection of taxpayers' voluntary contributions to official parties through California's personal income tax returns. Cal. Revenue and Taxation Code §§ 18701 *et seq.*

Due to these state-conferred advantages, ballot-qualified parties are uniquely situated to influence and exploit nonpartisan elections. If the parties are allowed to endorse, support and oppose candidates for nonpartisan offices, the parties will be able to use "resources amassed in the [partisan] marketplace to obtain an unfair advantage in the [nonpartisan] marketplace." The *Austin* Court recognized that Michigan had a compelling interest in "counterbalanc[ing] those advantages unique to the corporate form. . . . " 110 S.Ct. at 1400. California likewise has a compelling interest in counterbalancing, in the nonpartisan context, those political advantages unique to the ballot-qualified parties.

(Continued from previous page)

but also on *independent expenditures*, which involve no *quid pro quo* or prearrangement with the candidate. 110 S.Ct. at 1395.

The Ninth Circuit attempts to distinguish *Austin* on the ground that it is limited to instances of financial corruption. Pet.App. A, p. A-5. As noted in Judge Rymer's dissent, however, the threat to an impartial judiciary and to fair and effective local government can arise from political as well as financial debt. Pet.App. A, p. A-42, citing *Bellotti, supra,* 435 U.S. at 788 fn.26 (importance of government interest in preventing corruption through creation of political debts "has never been doubted"), *Letter Carriers, supra,* 413 U.S. at 565 and *Buckley, supra,* 424 U.S. at 26-27.

While endorsements by other organizations may also create an appearance of political debt, only the official parties enjoy the state-conferred advantages that give party endorsements a disproportionate potential to distort the nonpartisan election process. Just as the economic advantages conferred on corporations may justify restrictions on First Amendment rights, so may the advantages conferred by California on the official parties justify restrictions on the parties' rights to endorse, support or oppose candidates in nonpartisan elections.

Respondents argue that the reasoning of *Austin* is inapplicable to organizations, such as political parties, whose influence derives from the popularity of their ideas rather than from their economic success. They cite *MCFL, supra,* 479 U.S. 238.

In *MCFL,* the Court held that a Massachusetts statute restricting corporate contributions to political candidates was unconstitutional as applied to a nonprofit "pro-life"

organization. Like the statute in *Austin,* the Massachusetts law was intended to address the danger that state-conferred economic advantages could be converted into political power. The Court reasoned that this danger was not present in the case of an organization which, by its very purpose, did not make use of those economic advantages. 479 U.S. at 259. The influence of such an organization derives solely from its popularity, not from the state-conferred benefits. *Ibid.* Thus, *MCFL* stands for the rule that the state cannot apply a facially valid restriction on speech to an entity that does not present the danger the restriction is meant to avoid.

That rule does not apply here. Parties do present the danger section 6(b) is meant to avoid. The influence and popular support of a California political party are directly related to its state-conferred benefits. Those benefits enhance the parties' resources, power and popularity. Section 6(b) ensures that the parties do not convert their state-supplied advantages in the partisan arena to undue influence in the nonpartisan arena. The provision is constitutional as applied to ballot-qualified parties.

B. Section 6(b) Is Not Overinclusive

Respondents' second argument is that section 6(b) is overinclusive because it restricts the activities of even those relatively noninfluential parties whose endorsements would not sway an election. The Court rejected a similar argument in *Austin;* namely, that the Michigan state was overinclusive because it banned independent campaign expenditures even by noninfluential corporations. The Court emphasized that its concern was the potential to distort the political process by means of state-conferred advantages:

> **Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the *potential for distorting the political process. This potential for distortion* justifies § 54(1)'s general applicability to all corporations.**

110 S.Ct. at 1398 (emphasis added); *see also FEC v. National Right to Work Committee*, 459 U.S. 197, 209-10 (1982) ("While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the *potential* for such influence that demands regulation." Emphasis in original.) In this case, all of the ballot-qualified parties are beneficiaries of the statutory scheme, and all have the potential to use those advantages to distort the nonpartisan process.

C. The Record In This Case Shows That Section 6(b) Is Necessary To Preserve Nonpartisanship

Respondents' third argument is that the City has failed to produce evidence of any harm resulting from party endorsements in nonpartisan elections before the voters specifically banned such endorsements in 1986. Absent such proof, respondents assert, the Court cannot conclude that the prohibition on endorsements is necessary to preserve nonpartisanship. This argument is based upon a false premise.

Respondents rely upon Justice Mosk's statement in *Unger II* that prior to the adoption of section 6(b). "It [was] customary for the governing bodies of political

parties to endorse or assist candidates in elections for nonpartisan offices." 37 Cal.3d at 616.

This assertion misreads the study on which Justice Mosk relied. *Id.*, at fn. 7, citing Lee, *The Politics of Nonpartisanship*, Tables 32 and 33 at 103 (1960) [attached as Appendix A to Petitioners' Reply Brief In Support of Petition for Certiorari]; *see also*, Pet.App. A, pp. A-8, A-9, A-14. Lee's survey does not show that party endorsements were customary before section 6(b) was enacted. The survey shows only that between 1956 and 1960, endorsements occurred in at most 9 percent of the responding counties and 7 percent of the cities. Given the wording of the questions asked in the survey, even these endorsements may have been made either by non-official political clubs (as opposed to central committees) or by party officials in their individual capacities.[11] Such endorsements would not be proscribed by section 6(b). Furthermore, none of Lee's data addresses judicial elections.

---

[11] The question asked in Lee's survey was this: "In any election for city, county, or school office (not state or national office) in your county in the last four years, has there been any public or openly visible activity on the part of either political organization: county committee, local political clubs, party officials or representatives, etc.?" [Emphasis omitted.] Lee, at 102-03, 201. Responders in only 11 of 44 counties (25%) and 18 of 192 cities (9%) answered affirmatively. *Id.* When broken down by type of activity, the responses indicated that endorsements occurred in at most 4 of 44 counties (9%) and in at most 13 of 192 cities (7%). Lee, Table 33 at 103. Similarly, fundraising occurred in at most 7 of the 44 counties (16%) and at most 9 of 192 cities (5%). Lee, Table 33 at 103. Again, it is unclear whether these were funds raised by official parties or unofficial political clubs.

Thus, Lee's results provide no basis for concluding that party endorsements were customary before 1986. Indeed, the study supports the opposite conclusion: party endorsements in nonpartisan races occurred at most sporadically. Even the Ninth Circuit *en banc* court recognized that local party organizations in the vast majority of counties in California did *not* endorse in nonpartisan races before section 6(b) was enacted. Pet.App. A, p. A-1.[12]

Respondents are therefore wrong in asserting that California's tradition of independent local politics is unrelated to the state's limits on partisan political activity. From 1911 to 1986, California's political parties by and large refrained from the partisan activity that section 6(b) forbids. The absence of any history of Ruef-type

---

[12] The record in this case shows that even former Governor and chair of the California Democratic Party, Edmund G. Brown, Jr., acknowledges that the general understanding prior to *Unger II* was that parties could not endorse in nonpartisan races. In his declaration in support of Amicus California Democratic Party's motion for rehearing before the Ninth Circuit, Brown testified that political parties in California have traditionally been weak, due in significant part to the fact that parties believed they could not endorse in nonpartisan races even before section 6(b) was enacted:

> For the better part of this century, political parties in California have been rendered impotent. *A significant factor contributing to party weakness has been the ban on party endorsements in primaries and nonpartisan races.*

Declaration of Edmund G. Brown, Jr., In Support of California Democratic Party's Motion for Rehearing, ¶8 (emphasis added).

machine politics in California since 1910 actually demonstrates the benefits which result when official parties do not endorse in local and judicial elections. As Judge Trott wrote in the original panel decision, "[t]he durability and efficacy of a solution should not be used as a reason to ignore its *raison d'etre*." Pet.App. B, p. A-97.

When California's nonpartisan solution was threatened by the decision in *Unger II*, the people did not wait to see the effects. Nor did they have to. The Court has repeatedly rejected the argument that "a State's political system [must] sustain some level of damage before the legislature [may] take corrective action." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Munro*, the Court held that a state was not required to make a particularized showing of actual harms suffered prior to the imposition of reasonable restrictions on ballot access. 479 U.S. at 194-95. Thus, even in the absence of definitive evidence on this issue, the voters of California are entitled to act on the basis of their reasonable belief that partisan endorsements are incompatible with a system of nonpartisan elections. *See generally, Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (lawmakers may assume without scientific data that exposure to obscene material adversely affects individuals and society).

D. No Less Restrictive Alternatives Are Available to Preserve California's Interest in Nonpartisanship

Respondents' fourth argument is that a ban on endorsements is not the least restrictive alternative necessary to preserve nonpartisanship. The Ninth Circuit cites

several existing provisions of the California Elections Code as examples of less drastic means of preserving nonpartisanship. Pet.App. A, p. A-8 fn. 4. Such provisions include (1) the prohibition upon party nomination of candidates for nonpartisan office, Cal. Elections Code § 37; (2) the requirement that nomination papers and candidates' statements for nonpartisan offices not refer to party affiliation. Cal. Elections Code §§ 6401.5, 10012; (3) the requirement that the candidate's party affiliation not appear on the nonpartisan ballot, Cal. Elections Code § 10200.5; (4) the provision that a voter may cast his or her ballot for a candidate for nonpartisan office without regard to party affiliation, Cal. Elections Code § 10214; and (5) the requirement that partisan and nonpartisan offices be listed separately in separate columns on the ballot form, Cal. Elections Code § 10207.

The least restrictive alternative test does not, of course, mean that *any* alternative will do. Courts must measure the suggested alternatives against the ultimate purpose that the challenged regulation is intended to advance:

> It is not helpful to ponder what is "less restrictive" without thinking about the functions the rules serve and how these functions would be affected by "less restrictive alternatives" *Every* alternative is more restrictive than some other one. [Emphasis in original.]

Stevenson v. State Board of Elections, 794 F.2d 1176, 1180 (7th Cir. 1986) (Easterbrook, J., concurring).[13]

---

[13] Respondents' reliance on *Concerned Democrats v. Reno*, 458 F.Supp. 60 (S.D.Fla. 1978) is misplaced. In *Concerned*

(Continued on following page)

In this case, the function of section 6(b) is to keep judicial, school and local elections nonpartisan. In *Unger I*, the California Court of Appeals defined "nonpartisan" as follows:

> *"Not affiliated with or committed to the support of a particular party: politically independent . . .* viewing matters or policies without party bias . . . held or organized with all party designations or emblems absent from the ballot . . . composed, appointed, or *elected without regard to party affiliations of members . . . "* (Webster's New Internat. Dict. (3rd ed. 1965).

Unger I, supra, 102 Cal.App.3d at 685 (emphasis added); *see also, State v. District Court*, 122 Mont. 464, 476, 206 P.2d 166, 172 (1949) ("A nonpartisan is a person appointed or elected without regard to political affiliations; not controlled by parties or party spirit or interest.")

As these definitions reflect, banning party nominations and partisan nomination papers is a necessary but insufficient protection for nonpartisan elections.

(Continued from previous page)

Democrats, the district court invalidated a Florida statute banning endorsements in nonpartisan judicial elections on the ground that less drastic alternatives were available. The court did not, however, consider whether Florida political parties had special advantages under state law, and did not analyze whether the alternatives really served the same *function* as the endorsement ban. Moreover, the statute in *Concerned Democrats* banned not only endorsements by official parties but also endorsements by any partisan political organization. 458 F.Supp. at 65. Section 6(b) regulates only the activities of official parties and hence does not suffer from the same over-inclusiveness.

These measures alone hardly insure that judges or municipal officeseekers will be elected "without regard to the[ir] party affiliations." If parties, with their special advantages, can endorse and support such candidates, as a practical matter, few candidates other than those backed by the parties will be able to compete successfully. J.A. 28, 29-30. As Judge Trott wrote in the original panel decision, permitting parties to circulate endorsements and support candidates in nonpartisan races "would undercut the statutory prohibition against party nominations to the point of rendering it useless." Pet.App. B, p. A-100.

Similarly, the statutory prohibitions on listing party labels on ballots is not enough to preserve nonpartisanship. *See* Cal. Elections Code §§ 6401.5, 10012.[14] To believe otherwise is to indulge the fiction that voters do not remember endorsement advertising and do not bring slate cards to the polls.

Thus, nonpartisan nomination and ballot procedures, whether singly or in combination, are not real alternatives to section 6(b). Indeed, respondents' argument

---

[14] Curiously, while arguing for the adequacy of less restrictive alternatives to section 6(b), several of the parties who appear as respondents in this action, represented by the same counsel, seek to invalidate some of those alternatives. A Ninth Circuit panel rejected their First Amendment challenge to California Elections Code section 10012, banning references to party affiliation in candidates' statements for nonpartisan office. *See Mark v. Corwin*, 914 F.2d 1249 (9th Circuit 1990). However, the court recently granted rehearing *en banc* of that decision. *See Mark v. Corwin*, 924 F.2d 175, 1991 WL 7943 (Jan. 30, 1991).

concerning these "less drastic alternatives" is analogous to one rejected in *Buckley*:

> Appellants contend that the contribution limitations must be invalidated because bribery law and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutory purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

424 U.S. at 27-28. In the same vein, the people of California were entitled to conclude that prohibiting party nominations, banning statements of party affiliation on nominating papers and insuring a nonpartisan ballot were only "partial measures" in protecting the important interests advanced by nonpartisanship.

E. Section 6(b) Is Not Overbroad On The Ground That It Imposes A Total Ban On Party Activity

Respondents' final argument is that section 6(b) is overbroad because it imposes "a total ban on any partisan gesture of support for or opposition to a candidate." Pet.App. A, p. A-8. But no lesser restriction would be

consistent with the preservation of an effective nonpartisan system.[15] The *Letter Carriers* Court rejected the argument that lesser restrictions upon political activities by federal employees might have been adequate:

> It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another. . . . Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

413 U.S. at 566-67. Similarly, the judgment of the people of California has been that to preserve nonpartisanship in local and judicial elections, it is not enough merely to ban party nominations. *See* Cal. Elections Code § 37. To appreciate the soundness of this judgment, one need only envision party slate mailers and bus placards bearing party endorsements in judicial races. As Judge Trott wrote in the panel decision below:

> It is likely that any process by which a major political party would decide whom to endorse – or support – would effectively determine who could and who could not run for that office. This is incompatible with California's rule that neither a party not its central committee may nominate a candidate for nonpartisan office; and it is certainly the very essence of what nonpartisanship is designed to avoid.

Pet.App. B, p. A-100.

---

[15] As Judge Rymer points out in dissent, section 6(b) does not prevent individual members of party central committees from endorsing candidates. Nor does it prevent collective endorsements by members of central committees if they associate themselves under a different banner than that of the official party. Pet.App. A, p. A-36.

California must therefore be allowed to adopt a bright-line measure such as section 6(b), "if confidence in the system of [nonpartisanship] is not to be eroded to a disastrous extent." *Letter Carriers, supra,* 413 U.S. at 565. The state "need not choose a rule so much less restrictive that it also is useless in achieving the state's purposes." *Stevenson, supra,* 794 F.2d at 1180; *see also Storer, supra,* 415 U.S. at 736 ("[T]he Constitution does not require the states to choose ineffectual means to achieve its aims."). A ban on endorsements eliminates party influence over nonpartisan elections, as the voters of California intended when they adopted nonpartisanship for judicial and local offices. Section 6(b) is precisely drawn to prevent the specific danger identified by the state. It should be upheld.

IV. ARTICLE II, SECTION 6(b) DOES NOT DENY EQUAL PROTECTION

Respondents have also argued in this litigation that section 6(b) violates that Equal Protection Clause of the Fourteenth Amendment. They have asserted that the measure unlawfully discriminates against parties because it does not ban endorsements by other entities which can also exert influence on nonpartisan officials.

Respondents included no Equal Protection claim in their complaint. J.A. 5, 6. Even if they could raise the claim now, however, it would be easily disposed. The argument is the same as respondents' earlier claim that section 6(b) is underinclusive for First Amendment purposes. It fails for identical reasons.

First, official parties and other entities are not similarly situated. The parties have special statutory benefits which advantage them in the nonpartisan arena. Moreover, given the fundamental rights at stake, the test under the Equal Protection Clause is the same strict scrutiny test that applies under the First Amendment. *See Police Department v. Mosely*, 408 U.S. 92, 101 (1972). As discussed above, compelling interests justify section 6(b) and it is narrowly tailored to serve those interests.

V. CONCLUSION

For the reasons set forth above, this Court should reverse.

DATED: February 28, 1991

Respectfully submitted,

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys

By LOUISE H. RENNE
City Attorney
and Counsel of Record

Attorneys for Petitioners

FILED
APR 3 1991
OFFICE OF THE CLERK

No. 90-759

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

LOUISE H. RENNE, et al.,

Petitioners

vs.

BOB GEARY, et. al.,

Respondents

SUDI TRIPPET, Respondent in pro per

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

Sudi Trippet
[redacted]
1800 Market #213
San Francisco CA 94102
(415) 547-5433

BEST AVAILABLE COPY

No. 90-769

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

LOUISE H. RENNE, et al.,

Petitioners

vs.

BOB GEARY, et. al.,

Respondents

SUDI TRIPPET, Respondent in pro per

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

Sudi Trippet
℅ Grassroots Election Action
1800 Market #213
San Francisco CA 94102
(415) 547-5433

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
Cases	
Democratic Committee v. Eu 9th Circ (1987) 826 F 2d at p. 824	5,6,7
Geary v. Renne No. District California No. C87 4724 AJZ	2,6,7,8,9
Kleindienst v. Mandel (1972) 408 U.S. 753	4,7
Lamont v Postmaster General (1985) 381 U.S. 301	4,5,7
Virginia Pharmacy Board v. Virginia Consumer Council (1976) 425 U.S. 748	3,4,7
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	10

SUMMARY OF ARGUMENT

In this case, California has attempted to impose an absolute ban on all speech by political parties, endorsing, supporting or opposing candidates for any non-partisan local school or judicial office.

The plaintiffs in this case, as voters and would-be recipients of such election speech, plainly have standing to challenge the endorsement ban.

The endorsement ban is contrary to settled First Amendment principles as an absolute prohibition against communicating or receiving a certain class of political speech and, as such, is a paternalistic deprivation of voters' right to receive and distribute election speech, as well as parties' and candidates' right to transmit it.

ARGUMENT

As a registered voter and as co-ordinator of an association of registered voters (Election Action), I represent the point of view of the voting public, and in 1987, along with several other registered voters (Bob Geary, Melissa Gundrun, David Soule, Dennis Mark, Robert Silvestri, Wayne Johnson, Max Woods and Peter Johnson), sued the City and County of San Francisco as "would-be recipients of communication of political party endorsements through the voters' pamphlet". (MEMORANDUM OF POINTS AND AUTHORITIES REGARDING STANDING, Geary v. Renne District Court, No. C87 4724AJZ, p.5.

Recipients or potential recipients have First Amendment rights and standing to sue to invalidate unconstitutional restrictions on communication.

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and recipients both. This is clear from the decided cases.

Virginia Pharmacy Board v. Virginia Consumer Council (1976) 425 U.S. 748, 757; emphasis added.

Thus, in numerous cases, it has been held that the would-be recipient of communication may sue to invalidate restrictions on such communication.

In Virginia Pharmacy, supra, at pp.753, fn. 10, 756-757, the Supreme Court held that an individual user of prescription drugs, and two organizations who have members who are users of prescription drugs, had standing to sue to

challenge the constitutionality of a Virginia statute prohibiting advertising of prescription drug prices in their capacity as would-be recipients of such information. The Court made this ruling despite objections that a would-be transmitter of information (i.e. a pharmacist) had not joined in the lawsuit. Virginia Pharmacy, supra, at p. 757, fn. 15.

In Kleindienst v. Mandel (1972) 408 U.S. 753, 759-760, 762-764, the Supreme Court held that a group of university professors had standing to sue to challenge the exclusion of a Belgian socialist from the United States on the (grounds) that an order by the U.S. Attorney General had interferred with the professors' constitutional right to hear Mr. Mandel explain and defend his views.

In Lamont v. Postmaster General

(1965) 381 U.S. 301, the Supreme Court permitted American recipients of publications from communist countries to challenge a statute permitting postal authorities to refrain from delivering "communist propaganda"unless the would-be recipient requested delivery in writing.

Plaintiffs believe that San Francisco County Democratic Central Committee v. March Fong Eu (9th Cir. 1987) 826 F.2d at p. 824, is almost exactly on-point with respect to the standing issue. In Eu, the Court found that individual Democratic and Republican voters had standing to challenge a California statute which bars pre-primary endorsements by political party central committees. The Court noted:

> The state never offers any satisfactory explanation as to why the county committees cannot challenge the statutes prohibiting preprimary endorsements as an infringement of their rights to speak freely. Nor has the state explained why the individual party members cannot challenge these statutes as an infringement of their First Amendment right to listen.

Eu, supra, at p. 824, emphasis partially in original.

In the instant case, all of the plaintiffs are voters, organizations of voters (Election Action), or officers of such associations (Sudi Trippet). They are, therefore, would be recipients of political party endorsements printed in the voters' pamphlet, or representatives of same. As would-be recipients of endorsements that are banned by Cal. Const. Art. II, Section 6(b), plaintiffs plainly have standing to challenge said endorsement ban under the rationale of

Virginia Pharmacy, Mandel, Lamont and Eu. (MEMORANDUM OF POINTS & AUTHORITIES, Geary v. Renne, supra at pp. 4-6.)

On April 3, 1991, I submitted a respondent's reply brief on the questions in this case, which was unfortunately rejected due to technical defects. In that brief, it was stated that:

> (Election Action) respondents represent the view that 6(b) is a paternalistic deprivation of our right to receive election speech in the form of official party slate cards, as well as our right to distribute such speech, and to be hired to do so.

Geary v. Renne, supra, Trippet Reply Brief at p. 5 (Reply Brief attached).

Our view is that election speech is the highest order of free speech and that any restrictions on receiving or announcing that speech are violations of our most precious First Amendment protection to unfettered access to information and free

exchange of ideas about election matters.

6(b) paternalistically reduces the availability of information to the interested, violating freedom to receive speech.

It violates the right to peaceably assemble to discuss politics and the individual's freedom of association and group speech.

Neither a compelling interest nor narrow tailoring can save it, since it is prohibitive rather than regulatory.

Limits on whether, which, whose and to whom opinions may be announced are constitutionally prohibited per se.

As stated in Trippet's Reply Brief:

> 6(b) unconstitutionally makes electoral speech less free than advocacy on religion, history and other subjects. It discriminates against electoral organizations, as compared to religious, civil rights and other groups and speakers. Its ban on advice as to how to vote is intended to shield democracy from free speech, and is audience-based

> discrimination, reducing the freedom to speak to voters, as compared to other audiences. It reduces political liberties as compared to historic standards as understood by the Framers of the Constitution, thus "abridging" freedom of speech.

Trippet Reply Brief, Geary v. Renne, p.4.

Since the right to speak about politics (and especially electoral politics), is protective of all other constitutional rights, it has the utmost urgency among all liberties. If the most influential of voices are not free to speak and be heard about the most important of subjects, is anything secure?

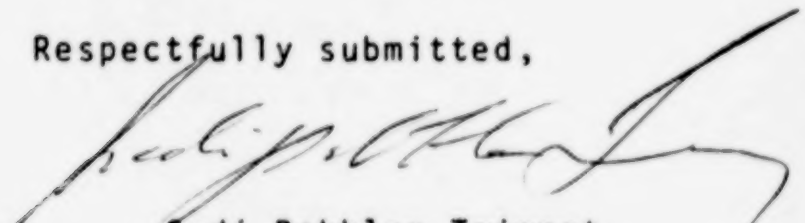
A conservative reading of the Constitution would conserve "freedom of speech", as it historically existed and was historically understood, to be reduced only by Amendment, not by gradual "abridging".

CONCLUSION

For all of the above reasons, the judgment of the Ninth Circuit Court of Appeals, which invalidated California's endorsement ban, must be affirmed.

Dated: April 29, 1991

Respectfully submitted,



Sudi Pebbles Trippet

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF ON THE MERITS

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
Chief Assistant City Attorney
and Counsel of Record
THOMAS J. OWEN
Deputy City Attorney
206 City Hall
San Francisco, CA 94102
(415) 554-4213

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. SECTION 6(b) SERVES CALIFORNIA'S COMPELLING INTERESTS IN PRESERVING NONPARTISANSHIP 2

A. California's Interest In Structuring Its Government 2

B. California's Interest In Avoiding Disproportionate Influence In Local And Judicial Elections 4

C. California's Interest In The Impartial, Fair And Effective Administration Of Government And Law 7

D. California's Interest In Preserving Confidence In Local Government And Courts .. 9

III. SECTION 6(b) IS NARROWLY TAILORED TO SERVE CALIFORNIA'S COMPELLING INTERESTS IN NONPARTISANSHIP 11

A. Section 6(b) Is Not Underinclusive 11

B. Section 6(b) Is Not Overinclusive 13

C. Section 6(b) Is Not Invalid On The Theory That It Imposes A Total Ban On Party Advocacy 13

D. No Less Restrictive Alternatives Adequately Protect California's Compelling Interest In Nonpartisanship 15

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 3, 14, 19

Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 15

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ... 9, 10

Boos v. Barry, 485 U.S. 312 (1988) 9, 10

Bridges v. California, 314 U.S. 252 (1941) 11

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7

Buckley v. Valeo, 424 U.S. 1 (1976) 5, 7, 8, 9

California Medical Ass'n. v. FEC, 453 U.S. 182 (1981) 14

Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) ..... *passim*

Connick v. Myers, 461 U.S. 138 (1983) 7

Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530 (1980) 7

Craig v. Harney, 331 U.S. 367 (1947) 11

Elrod v. Burns, 427 U.S. 347 (1976) 17

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 5, 6

FCC v. League of Women Voters, 468 U.S. 364 (1984) ... 6, 9

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 14

TABLE OF AUTHORITIES – Continued

Page

FEC v. Massachusetts Citizens For Life, 479 U.S. 238 (1986) 4

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 5

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 17

First National Bank v. Bellotti, 435 U.S. 765 (1978) 3, 5, 7, 9, 10, 17

Furman v. Georgia, 408 U.S. 238 (1972) 10

Jenness v. Fortson, 403 U.S. 431 (1971) 3, 13

Luther v. Borden, 7 How. 1 (1849) 1

Mistretta v. United States, 488 U.S. 361 (1989) 10

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 19

New State Ice Co. v. Liebman, 285 U.S. 262 (1932) 15

New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989) 19

New York Times v. Sullivan, 376 U.S. 254 (1964) 11

Pennekamp v. Florida, 328 U.S. 331 (1946) 11

Pickering v. Board of Education, 391 U.S. 563 (1968) 7

Posadas de Puerto Rico Ass'n. v. Tourism Co., 478 U.S. 328 (1986) 16

Sable Comm'ns v. FCC, 492 U.S. 115, 109 S.Ct. 2829 (1989) 20

Storer v. Brown, 415 U.S. 724 (1976) 3, 17, 19

TABLE OF AUTHORITIES – Continued

Page

Sugarman v. Dougall, 413 U.S. 634 (1973) 2

Unger v. Superior Court, 37 Cal.3d 612 (1984) 10, 18, 20

United States v. Automobile Workers, 352 U.S. 567 .. 3, 9, 14

United States v. CIO, 335 U.S. 106 (1948) 13

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 19

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 9, 10

Wood v. Georgia, 370 U.S. 375 (1962) 11

OTHERS

California Constitution, Article II

Section 6(a) 2

Section 6(b) ..... *passim*

Mayo, "The 1961 Mayorality Election In Los Angeles: The Political Party In A Non-Partisan Election," 17 West.Pol.Q. 325 (1964) 12, 18

MacDonald, A., *American City Government and Administration* (6th ed. 1947) 16, 18

Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century," 88 Colum.L.Rev. 1 (1988) 2, 3, 19

Note, "Local Nonpartisan Elections, Political Parties and the First Amendment," 87 Colum.L.Rev. 1677 (1987) 2, 12

The Federalist (Lodge ed. 1888)

No. 10 (Madison) at 58 4

No. 39 (Madison) at 233 16

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

REPLY BRIEF ON THE MERITS

I.

INTRODUCTION

Ballot-qualified parties occupy a privileged place in California's government. The people of California enacted Article II, §6(b) to confine the parties' state-enhanced power to its intended arena. Respect for the citizens' right to select their own governmental forms should guide this Court's decision as to whether §6(b) must be "narrowly tailored," and if so, just how narrowly tailored it must be.[1] Even under the strictest standard, however, §6(b) is valid.

---

[1] As this Court has said in dictum:

"[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. [Citations omitted.] This is

(Continued on following page)

II.

SECTION 6(b) SERVES CALIFORNIA'S COMPELLING INTERESTS IN PRESERVING NONPARTISANSHIP

A. California's Interest In Structuring Its Government

Respondents and the California Democratic Party ("CDP") assert that §6(b) serves no compelling interest in the structure of California's government. Their argument misconceives the functions of nonpartisanship, its place within statewide government, and the role §6(b) serves in advancing the goals of nonpartisanship.

Initially, we note that no one challenges California's right to establish a nonpartisan structure of local and judicial government. *See* Cal.Const. Art.II, §6(a). Nonpartisanship serves a critical function:

> Like initiatives and referenda, which seek to give citizens direct control over passing legislation, nonpartisan systems seek to give citizens direct control over their representatives by eliminating political parties as the conduit between citizens and their government.

Note, "Local Nonpartisan Elections, Political Parties and the First Amendment," 87 Colum.L.Rev. 1677, 1697 (1987) ("Nonpartisan Elections").

The Guarantee Clause clearly protects this form of government: "Republican government . . . is responsible to its voters rather than to any outside agency." Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century," 88 Colum.L.Rev. 1, 41 (1988)

(Continued from previous page)

> nothing more than a recognition of a State's constitutional . . . responsibility for the establishment in operation of its own government. . . . U.S. Const., Art. IV, § 4; U.S. Const., Amd. X; *Luther v. Borden*, [7 How. 1 (1849)]); *see In Re Duncan*, 139 U.S. 449 (1891)."

Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

("Merritt"). The essence of republican liberty is that those entrusted with power should answer directly to the people. *Id.* at 23.[2]

Section 6(b) serves this interest by ensuring that judges and local officials are not beholden to parties. *See* Petitioners' Brief on the Merits ("Pet.Br.") 13-16. If parties can endorse, the danger is that nonpartisan officials will be critically concerned with party support, and parties will occupy the central role nonpartisanship seeks to avoid.

The reasons this danger exists are clear. Nonpartisanship in California operates within a statewide structure that is partisan. To stabilize its political system, California gives political parties a special role.[3] To fulfill that role, parties receive special advantages. *See* Pet.Br. 15. These advantages translate into influence that cannot be segregated between statewide elections on one hand, and local and judicial elections on the other. *See* Pet.Br. 23.[4]

Moreover, the effect of these advantages is multiplied because so "many local elections involve only one viable party. . . . " Nonpartisan Elections, 87 Colum.L.Rev. at 1679.[5] In Madison's words:

---

[2] Promoting direct, citizen responsibility for the electoral process is a compelling state interest. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-789 (1978); *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957).

[3] The state's right to give parties with demonstrated support a special position has long been recognized. *See, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971); *Storer v. Brown*, 415 U.S. 724, 736 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974).

[4] In addition to the advantages already noted, California assists parties by providing a party affiliation check-off on voter registration forms. Cal.Elec. Code §501.

[5] The ACLU's statistics on San Francisco's Democratic Party domination support this point. The party balance is reversed in counties such as Orange, where Republicans outnumber Democrats by a 55.63% to 33.93% margin. Cal. Sec'y of State, *Report of Registration* (10/9/90) at 1-2.

> The smaller the society, . . . the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

The Federalist, No. 10 at 58 (Lodge ed. 1888). When one party dominates in a community, "that party organization's support can be crucial to winning an election." Note, Nonpartisan Elections at 1696. If §6(b) is invalidated, judges and other local officials will not miss that point.[6] And parties will be back in the intermediary role from which nonpartisanship seeks to remove them.

B. California's Interest In Avoiding Disproportionate Influence In Local And Judicial Elections

Respondents and CDP argue that political parties do not pose the threat of disproportionate influence addressed in *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (1990), because the parties' political power derives from their popular support. This argument overshoots the mark. Statutory benefits assist parties in *developing* popular support, giving them a state-sponsored edge in building their power. Avoiding such state favoritism is the central concern in *Austin*. Likewise, §6(b) is aimed at keeping state-favored parties from expanding their influence in an arena they were not meant to control.

Respondents argue that the true concern in *Austin*, when read together with *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986) ("*MCFL*"), is the lack of correlation between corporate political influence and popular

---

[6] Nor will the point be missed by party outsiders or independents who might otherwise consider a run for local office. *See* Pet.Br. 17. Neither Respondents nor CDP refers to the state's interest in keeping nonpartisan doors open to such candidates.

support for the corporation's ideas. By limiting corporations' political spending to segregated funds, government assures that the money a corporation uses to speak comes from people who share its views.

This reasoning is not the foundation of *Austin*. If assuring shareholder support for political spending were *Austin's* rationale, government could prohibit corporations from using their general treasuries to lobby, or to support referenda. By holding that a state cannot forbid corporate spending on ballot measures, *Bellotti* forecloses that result. Thus, the true rationale of *Austin* and *MCFL* is preventing entities from using advantages – given by the state for other purposes – to compete for influence in candidate elections.[7]

Respondents contend that financial corruption cases such as *Austin* have no bearing here because "[t]he hallmark of corruption is the financial *quid pro quo*; dollars for political favors." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("*NCPAC*"). This argument, however, ignores the fact that *Austin* is a case about *independent expenditures*, which, by definition, involve no prearrangement and no infusion of cash to a candidate or his campaign. *See NCPAC* at 498. Even so, the Court upheld Michigan's right to ban the Chamber of Commerce's full-page endorsement advertisement, a clear suppression of core "debate on the qualifications of candidates." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

---

[7] *Austin* establishes that counterbalancing such advantages in candidate elections is not an unconstitutional attempt "to restrict the speech of some elements of our society in order to enhance the relative voices of others. . . ." *Compare Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Respondents argue that *Eu* forecloses Petitioners' claim that state-conferred advantages justify a ban on party endorsements. *Eu*, of course, includes no discussion of the statutory advantages parties receive. There is a good reason. California gives parties those advantages for the express purpose of promoting the parties' role in partisan elections. A party's applying statutory advantages to the purpose for which they were granted does not create the danger present in *Austin* or this case.[8]

CDP asserts that nothing in *Eu* suggests that the Court's analysis turns on the fact that partisan offices were at stake. That is not surprising. In considering whether California's interests in banning pre-primary endorsements were compelling, this Court properly did not address California's very different interests in banning endorsements in nonpartisan elections.

Citing *FCC v. League of Women Voters*, 468 U.S. 364 (1984), CDP argues that speech bans are inappropriate if they encompass organizations whose resources are due largely to sources other than government benefits.[9] The holding of *League of Women Voters* is not so broad. Otherwise, it would be difficult to understand why the plaintiffs there abandoned and never resurrected their challenge to the *ban on candidate endorsements* by public

---

[8] For the same reason, CDP's citation to California Revenue and Taxation Code §18702 is unavailing. The party contribution check-off is aimed at promoting the influence of parties *in the partisan sphere*. The state may legitimately pursue this goal and still have a compelling interest in counterbalancing that advantage in *nonpartisan* elections.

[9] CDP points to its relative strength over minor parties as evidence that party influence is not simply a function of government advantages. *Austin* rejected a similar argument. *See* Pet.Br. 25-26. The fact that some parties may be connected to national parties or may use their statutory advantages more effectively than others does not undermine the state's interest in avoiding the danger that advantaged political institutions may disproportionately influence nonpartisan offices.

broadcasting stations. *Id.* at 371 n. 9, and 410 (Stevens, J., diss.).

CDP's reliance on *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) is also misplaced. The regulation there was not viewpoint-neutral and, contrary to the teaching of *Bellotti*, restricted corporate speech on public issues as opposed to speech about candidates. Section 6(b) suffers from neither defect.

C. California's Interest In The Impartial, Fair And Effective Administration Of Government And Law

Respondents and CDP attack Petitioners' reliance on *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973). First, they assert that the rationale of *Letter Carriers* applies only to government employees. Yet the very cases Respondents cite show that the validity of a restriction on speech turns not on the speaker's status as an employee but on an analysis of the interests at stake. *Compare, Connick v. Myers*, 461 U.S. 138, 150-152 (1983) *with Pickering v. Board of Education*, 391 U.S. 563, 572-73 (1968) (whether employee may be disciplined for speech critical of government turns on whether the speech concerns matters of public concern); *compare, Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (relying on *Letter Carriers* to uphold contribution limits which serve interest in avoiding corruption in government) *with Buckley* at 48 n. 54 (distinguishing *Letter Carriers* in invalidating independent expenditure limitations which do not further interest in avoiding corruption.)

Relying on the distinction between employees and non-employees, CDP seizes upon language in *Broadrick v. Oklahoma*, 413 U.S. 601, 616, (1973) stating that Oklahoma's "Hatch Act" restricts political expression "which if engaged in by private persons would plainly be protected. . . . " Ballot-qualified parties, however, are not "private persons," but state-advantaged institutions playing a special role in the state's electoral scheme. California's interests in counterbalancing their advantages and

influence statewide, in promoting citizen government and keeping the doors of nonpartisan office open to independent thinkers, and in assuring the appearance and actuality of a fair, impartial and nonpartisan system of law are even greater than the federal government's interest in *Letter Carriers*.

Respondents and CDP rely heavily on a footnote in *Buckley* which states that the *Letter Carriers* Court "repeatedly emphasized the [Hatch Act] provision . . . permitting an employee to ' "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." ' 413 U.S. at 579." *Buckley*, 424 U.S. at 48 n. 5.[10] But the critical line the Hatch Act drew does not assist Respondents: the Hatch Act (and its regulations) protected expression unrelated to party politics, while restricting expression related to party politics. 413 U.S. at 579. Indeed, the *Letter Carriers* Court specifically upheld regulations banning "the endorsement of 'a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material'." *Ibid*. The Court also upheld a prohibition on "[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or a political party office." *Ibid*.[11] The suggestion that this Court has rejected bans on endorsement of party candidates is mistaken.

---

[10] Section 6(b) does not limit individuals, including the members of a county central committee, from expressing their opinions on political subjects and candidates.

[11] The *Buckley* footnote suggests that the *Letter Carriers* Court did not rule on the constitutionality of these regulations, but found only that even if they were overbroad, the Hatch Act as a whole was not substantially overbroad. 424 U.S. at 48 n. 54. The footnote cites page 581 of the *Letter Carrier* opinion. But that page sets forth the Court's *alternative* holding. On the preceding page, the Court upheld the regulations *substantively* "for the same reasons that the other acts of political campaigning [were] constitutionally proscribable." 413 U.S. at 580.

Finally, Respondents and amici assert that §6(b) reflects the "paternalistic" approach that this Court has repeatedly rejected. In fact, virtually every restriction on protected speech may be characterized as "paternalistic" in the sense that it removes the opportunity to hear the message.[12] Yet as *Austin*, *Letter Carriers* and *Buckley* show, when the government's interests are sufficiently strong, restrictions on protected speech survive.[13] This is such a case.

D. California's Interest In Preserving Confidence In Local Government And Courts

"Perservation of the individual citizen's confidence in government" is an interest "of the highest importance." *First National Bank v. Bellotti*, 435 U.S. 765, 789 (1978), *Buckley*, 424 U.S. at 27. ("[A]voidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.' "). For this reason, the State's interest here is far more compelling than the interests asserted in *Boos v. Barry*, 485 U.S. 312 (1988); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Order in a democracy

---

[12] For example, California Election Code §10200.5 prohibits the listing of candidates' party affiliation on the ballot. Yet Respondents embrace this measure as a less restrictive alternative. Resp.Br. 59. Similarly "paternalistic" are the bans on endorsements by public broadcasters, *see League of Women Voters*, 468 U.S. at 371 n. 9, and on union endorsements communicated to the general public. *See U.S. v. Automobile Workers*, 352 U.S. 567 (1957). Yet these prohibitions have never been held invalid.

[13] For the same reason, the broad pronouncements of First Amendment jurisprudence which Respondents and amici cite are not litmus tests that resolve this case. *See, e.g.*, Resp. Br. 34-36; CDP Br. 4, 6, 8; ACLU Br. 12-13.

does not depend upon public confidence in druggists, lawyers or diplomats. It does, however, depend upon public confidence in government, particularly in the courts. *Cf. Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring.)[14]

Because Respondents and their amici understate the importance of preserving public confidence in government, they do not distinguish between the actuality of justice and its appearance. But since both are compelling interests, California need not prove that judges endorsed by political parties will in fact conform their decisions to the dictates of partisan pressure. The only proof needed to support California's interest in promoting the appearance of justice is the swift passage of Proposition 49 in June 1986, at the first general election after the California Supreme Court's decision in *Unger v. Superior Court*, 37 Cal.3d 612 (1984) (*"Unger II"*). The electoral results supply whatever "legislative findings" are necessary to demonstrate that California's electorate perceives partisan endorsements, particularly in judicial races, as a "threat to the confidence of the citizenry in government." *Bellotti*, 435 U.S. at 790. *See* Brief of Amicus California Judges Association ("CJA Br.") 8.

Respondents and their amici also fail to recognize that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality *and* nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added). These are two separate and distinct interests. Thus, amici err when they claim that judicial nonpartisanship is not "an end in itself," but

---

[14] Moreover, contrary to CDP's claim, the cases they cite do not hold that the governmental interests there asserted were of insufficient importance to justify the challenged policies. Instead, the holding in each case rested upon the challenged policy's failure to meet some *other* element of the "strict scrutiny" standard. *Boos v. Barry*, 485 U.S. at 324; *Bates v. State Bar of Arizona*, 433 U.S. at 368; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 766.

simply "one vehicle for electing officials." CDP Br. 22 n.15.

Respondents contend that if California chooses to have judicial elections, it is powerless to regulate participation in those elections so as to protect its simultaneous interest in maintaining the appearance of justice. This argument, too, overlooks the difference between judicial impartiality and nonpartisanship. Only party endorsements and support threaten confidence in a nonpartisan judiciary. The danger arises not from the persuasive value of the party's speech, but from the party *label* itself. *See* CJA Br. 11. And it is not an episodic danger that can be resolved through recusal, but a systemic danger to the judiciary as a whole. *See* CJA Br. 15.

Finally, Respondents' reliance on *Bridges v. California*, 314 U.S. 252 (1941), and its progeny[15] overlooks the fact that California has not tried to suppress speech criticizing judges or their decisions. *See New York Times v. Sullivan*, 376 U.S. 254, 272-273 (1964). Section 6(b) does not place judges or their decisions beyond the bounds of political discourse. Under §6(b), political party members and members of party central committees are free to praise and criticize judges as they see fit; they simply cannot do so as the official representatives of political parties and party central committees.

III.

SECTION 6(b) IS NARROWLY TAILORED TO SERVE CALIFORNIA'S COMPELLING INTERESTS IN NONPARTISANSHIP

A. Section 6(b) Is Not Underinclusive

Respondents argue that §6(b) is underinclusive because endorsements by political clubs, unions, and special interest groups pose an equal or greater danger to impartial government and courts. Yet none of these

---

[15] *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

groups enjoys an institutional role in the structure of California's government. California has partisan and nonpartisan government; the state does not have union and non-union government or corporate and non-corporate government.

Parties differ not only in their role and special advantages, *see* Pet.Br. 15, 23, but also in their mission. Their entire *raison d'etre* is building organizations to win elections:

> Parties operate by placing their members and supporters into positions of power. A major reason parties want to be involved in local nonpartisan elections is to groom candidates for higher partisan office. The local community, however, is interested in its own welfare, not in serving as a training ground for statewide politicians.

Note, Nonpartisan Elections, 87 Colum.L.Rev. at 1680. Given the parties' statewide and national role, the support their leaders bestow may often be motivated less by local concerns than by the need to enforce party loyalty. *Ibid.*; *see* Mayo, "The 1961 Mayorality Election in Los Angeles: The Political Party In A Non-Partisan Election," 17 West.Pol.Q. 325 (1964) (Democratic Party leaders oppose mayoralty candidate who supported Richard Nixon in 1960).[16]

Thus, §6(b) is not underinclusive; it applies to those political institutions and only to those political institutions whose endorsements threaten nonpartisanship.

---

[16] Quoting a declaration the Ninth Circuit expressly rejected as part of the record in this case, *see* Order of 4/30/90, CDP argues that a "political party is the *only* organization large enough, open enough, and public enough to give order and *direction* to democracy's political life." CDP Br. 8 (emphasis added). Thus, CDP acknowledges that parties differ from all other associations and that parties have the strength to direct political life. Party "direction" in local affairs is precisely what §6(b) was enacted to avoid.

B. Section 6(b) Is Not Overinclusive

Notwithstanding this Court's rejection of a similar argument in *Austin*, *see* Pet.Br. 25-26, Respondents continue to assert that §6(b) is overinclusive because it applies to weak parties as well as strong ones. Respondents claim that while the fortunes of corporations rise and fall, there have only been two major political parties in the United States. The argument ignores the place of influential third parties in this country's history and the influence of minor parties in individual communities.

Relying on *Jenness*, Respondents also argue that §6(b) fails to account for the "obvious differences in kind between the needs and potentials of a political party with historically established broad support on the one hand, and a new or small political organization on the other." 403 U.S. at 441-442. But *Jenness* was explaining why a state may differentiate between ballot-qualified parties and "political organizations" that have not demonstrated some minimal level of support; the Court was not referring to differences between strong and weak qualified parties. *Jenness* provides no support for Respondents' claim.

C. Section 6(b) Is Not Invalid On The Theory That It Imposes A Total Ban On Party Advocacy

Respondents and CDP assert that §6(b) forecloses all political advocacy by parties in nonpartisan elections. Even the Michigan statute in *Austin*, they point out, permits corporate spending through segregated PACs. And federal election law permits associations to communicate endorsements to their members. *See United States v. CIO*, 335 U.S. 106 (1948).

Neither point demonstrates that §6(b) is overbroad. First, the ban on political spending in *Austin* was quite absolute; it forbade all spending by the corporation as such. The statute allowed spending only by the corporate PAC, a different association composed of a subset of shareholders. Similarly, under §6(b), there is nothing to

prevent members of the political parties from joining together as Republicans or Democrats for any candidate. The same people can furnish the public with their viewpoints on candidates' records and qualifications. They simply may not do so in the name of the party.

Second, the difference between political parties, on one hand, and corporations or unions on the other, explains why §6(b)'s approach is necessary in a nonpartisan election setting.[17] Parties are election-dedicated organizations whose collective membership is "uniquely pervasive," *see FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978), covering virtually the entire electorate. Communication of endorsements to party members in a nonpartisan election is the equivalent of publication to the community. *Compare United States v. CIO*, 335 U.S. 106, with *U.S. v. Automobile Workers*, 352 U.S. 567 (1957). In an election environment, the notion of party endorsements circulated only to party members is a fiction.

Finally, Respondents emphasize that California stands alone in restricting party advocacy in local and school elections. But the fact that one state does not impose a particular restriction does not render the restriction unnecessary in the electoral scheme of another state. *See American Party of Texas v. White*, 415 U.S. 767, 785 n.17 (1974). The systems and experiences of each state differ.[18] California is the only state with a partisan, statewide political structure having nonpartisan nominating procedures for all school and local offices. *See* Appendix A. Thus, California's commitment to nonpartisan local offices is stronger than any other state with a partisan

---

[17] "[E]ntities [with] differing structures and purposes. . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n. v. FEC*, 453 U.S. 182, 201 (1981).

[18] *Cf., New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandis. J., diss.) (A "State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

statewide system. In addition, the statutory benefits California gives its political parties are greater than those in any other state. See Appendix B. Thus, the scope of §6(b) is simply a reflection of California's singular political structure, one that has served its purposes remarkably well.

D. No Less Restrictive Alternatives Adequately Protect California's Compelling Interest In Nonpartisanship

Respondents offer various alternatives to §6(b) which they claim are less drastic. In fact, none adequately serves the compelling interests which underlie the measure.

First, Respondents propose nonpartisan nominating procedures for all state offices. Having earlier argued that §6(b) is not a structural measure, Respondents now suggest that the state forego its right to structure statewide government on a partisan model.[19] *See* fn.3 *ante*. In examining whether less restrictive alternatives are available, however, a court should not require a state to choose another political structure. Otherwise, the Guarantee Clause which protects the right of each state to structure its representative forms of government, would be meaningless.[20]

---

[19] Louisiana has a system in which parties do not nominate candidates for statewide office. Respondents argue that if Louisiana had a §6(b), the Republican Party would not have been able to disavow the gubernatorial candidacy of David Duke. The argument is incorrect. In reality, the problem arose because under Louisiana law, Mr. Duke was permitted to list his party affiliation on the ballot in a nonpartisan race. Had the election taken place under California law, Mr. Duke would not have received the respectability and support that the listing of such party affiliation bestows. Moreover, nothing in §6(b) prevents a party from publishing the fact that a candidate claiming to be the party's own is not endorsed or supported by the party.

[20] Respondents assert that *Baker v. Carr*, 369 U.S. 186 (1962), and the other apportionment cases negate any claim

(Continued on following page)

Second, Respondents propose that California could make nonpartisan elective positions appointive. But it would surely be a pyrrhic victory for parties to gain the right to make endorsements in nonpartisan elections, only to have the state eliminate the elections altogether. *Cf., Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343 (1986). Removing the voters' right to select local executives and legislators is not a less drastic alternative but a complete restructuring of California's local government. With respect to judges, California has opted for the measure of responsiveness that elections provide. This decision in no way eliminates the state's compelling interest in protecting judges from the appearance of partisanship.

Respondent's other proposed alternatives also fall short. Nonpartisan nomination procedures, whether alone or in combination with a state "Hatch Act", limitation on party spending, public funding of elections, or longer terms of office, do not adequately protect the goals of nonpartisanship. As Respondents' own authorities conclude, so long as parties can endorse, "municipalities that are non-partisan in name [will be] decidedly partisan in fact." MacDonald, *American City Government and Administration*, 250 (6th ed. 1947); *see* fn. 22 *ante*.

Respondents attack Petitioners' failure to make a particularized showing that party endorsements cause this harm or that lesser measures would not adequately serve the state's interests in nonpartisanship. CDP asserts that

---

(Continued from previous page)

that the Guarantee Clause assists California in this case. But denial of "one person/one vote" undermines representative government, the foundation of republicanism. *See The Federalist*, No. 39 (Madison) 233 (Lodge ed. 1888). Section 6(b) does not.

the cases upholding statutes in the absence of such showings are not strict scrutiny cases.[21]

Respondents and amici are incorrect on several fronts. In *Austin*, for example, there was no particularized showing that the relative voice of corporations was significant or that the Chamber of Commerce benefited from a state-conferred corporate structure that facilitated the accumulation of wealth. 110 S.Ct. at 1422 (Kennedy, J., diss.). Indeed, in applying strict scrutiny, the *Austin* Court "accept[ed] Congress' judgment that it is the *potential* for such influence that demands regulation." *Id.* at 1398 (emphasis original), *quoting FEC v. National Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 209-210 (1982).

Similarly, in *Storer v. Brown*, 415 U.S. at 736, the Court relied on its own experience and common sense in upholding a statute that burdened associational rights:

> It appears *obvious* to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling. . . . *Nor do we have reason for concluding that the device California chose . . . was not an essential part of its overall mechanism* to achieve its acceptable goals. . . . To conclude otherwise *might* sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry. . . . [Emphasis added.]

In decrying the lack of proof of tangible harm, Respondents continue to assert that party endorsements

---

[21] CDP contends that *Letter Carriers* employs a rational basis test. That claim is inconsistent with *Bellotti*, 435 U.S. at 789 (characterizing the interests in *Letter Carriers* as "of the highest importance") and *Elrod v. Burns*, 427 U.S. 347, 366-367 (1976) (describing *Letter Carriers* as upholding speech restraints because "they did serve in a *necessary* manner to foster and protect efficient and effective government.") (emphasis added). *Elrod* itself applies strict scrutiny to restrictions on the First Amendment rights of government employees. *Id.* at 362.

were widespread before 1986, when §6(b) was enacted. The various studies Respondents cite disprove their claim.[22] But even assuming *arguendo* that party endorsements occurred with regularity before 1986, the argument fails.

First, in rejecting *Unger II* so decisively, California voters made clear that they intended the words "nonpartisan offices" in §6(a) to mean more than a system in which state-favored parties play no role in nominating the officeholders; they meant a system in which the parties do not play a role in *electing* the officeholders. In such a system, the officeholders answer directly to the people. To show harm to that vision, petitioners need not

---

[22] *See* Resp.Br. 21. For example, Respondents quote only the last sentence from the following passage:

> BEHIND-THE-SCENES PARTY CONTROL. Many times the desired result of nonpartisanship is actually achieved. In California cities, for example, local elections are usually fought out along local lines, without reference to Abraham Lincoln or Thomas Jefferson. But a number of municipalities that are non-partisan in name are very decidedly partisan in fact. For there is nothing to prevent the party organizations from endorsing their respective candidates and working as hard as ever for their election.

MacDonald, *American City Government and Administration* 250. As the full passage shows, party endorsements in California were the exception before §6(b) was enacted, and when they occurred, they jeopardized nonpartisanship.

Similarly, CDP argues that Professor Lee's study shows that party endorsements occurred in 90% of the highly populated counties of California. But that argument presumes that the endorsements were made by *official parties*. Lee's questionnaire was not limited to endorsements by official parties. See Pet.Br. 27 n.11. Significantly, one study Respondents cite shows that the "partisan" local activity was by party-related individuals and entities, *not by the parties themselves*. *See*, Mayo, *"The 1961 Mayoralty Election In Los Angeles: The Political Party In A Non-Partisan Election,"* 17 West.Pol.Q. 325 (1964).

produce evidence of actual corruption; the harm is to the citizens' "power to choose the government forms that work best for them." Merritt, 88 Colum.L.Rev. at 41.

The second answer is provided by *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro*, Washington enacted a law making access to the general election ballot more difficult for minor parties. The Ninth Circuit invalidated the law, reasoning that the State had produced no evidence that easy access to the general election ballot had created voter confusion or any other evil. *Id.* at 194-195. This Court reversed, finding the absence of such proof immaterial.

Indeed, this Court has long upheld statutes restricting voting rights, associational rights and core political speech based on history, legislative determinations, precedent and the court's own experience and common sense. *See, e.g., Munro*, at 196 (relying on "legislative perception"); *NRWC*, 459 U.S. at 210 (refusing to "second-guess a legislative determination . . . where corruption is the evil feared"); *Letter Carriers*, 413 U.S. at 557 (relying on "judgment of history"); *Storer*, 415 U.S. at 736 (relying on inherent persuasiveness of rationale underlying statue); *American Party of Texas v. White*, 415 U.S. at 787 ("Constitutional adjudication and common sense are not at war with each other.").

In this case, each of these bases for upholding §6(b) is present. First, the measure derives directly from California's history. *See* Pet.Br. 11-12. Second, the record includes uncontested testimony about the harmful effects of party endorsements in nonpartisan races. J.A. 27-37.[23] Third, the incompatibility of party endorsements and nonpartisan offices is a matter of common sense and ordinary

---

[23] Citing *New York City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989), CDP asserts that this Court must defer to the District Court's weighing of testimony. But *Morris* did not involve undisputed evidence. Reviewing courts may reweigh such evidence independently. *See U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

meaning. *See* Pet.Br. 31-32. Finally, the legislative history of §6(b), including the sponsor's statement, the ballot argument and the voters' rejection of *Unger II*, sets forth the reasons why California believed §6(b) was necessary to further their compelling interests. *See* Pet.Br. 9-10, 12-14, 19.

Notwithstanding the cases cited above, CDP argues that deference to such legislative history is not warranted here.[24] CDP relies on *Sable Comm'ns v. FCC*, 492 U.S. 115, 109 S.Ct. 2829 (1989). There, however, the FCC had specifically approved feasible, less restrictive regulations, and the government simply failed to implement them. *Id.* at 2837.

Here, following *Unger II*, it was the considered judgment of the citizens of California that a ban on endorsements was needed to preserve nonpartisanship. The expertise of the electorate in such matters cannot be doubted. The judgment should be reversed.

DATED: April 15, 1991 Respectfully submitted,

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
Chief Assistant
City Attorney and
Counsel of Record
THOMAS J. OWEN
Deputy City Attorney

By Dennis Aftergut
Chief Assistant City
Attorney and Counsel
of Record

Attorneys for Petitioners

[24] It is unclear what further evidence could be produced of what the voters thought when they enacted §6(b).

APPENDIX A

Comparison of Nonpartisan Local Nomination Procedures

This appendix groups the various states according to nonpartisan nomination procedures at the local government level, as provided by statute.

TIER I: *All Local Nominations Nonpartisan/State Nominations Partisan.*

CALIFORNIA. Cal. Const. Art. II, §6 (judicial, school, county and city offices).

TIER II: *All Local Nominations Nonpartisan/State Nominations Nonpartisan.*

LOUISIANA.[1] La. Rev. Stat. Ann. §§18:401 *et seq.*, 18:481 *et seq.*

TIER III: *Local Nominations Generally Nonpartisan/State Nominations Partisan.*

COLORADO. Colo. Rev. Stat. §§22-31-105, 22-31-107, 31-10-302, 31-10-902, 32-1-807, 32-1-811, (municipal, school district and special district offices).

MAINE. Me. Rev. Stat. Ann. title 30-A, §2553 (city offices).

NEBRASKA. Neb. Rev. Stat. §32-535 (state board of education, county superintendents, district superintendents, the state legislature, regents of the University of

[1] Louisiana operates a "primary" system for all offices, including local and judicial offices, but there is no party nomination.

Nebraska, directors of public power and irrigation districts, directors of reclamation districts, directors of natural resource districts, specified boards of education, and officers of 1st and 2nd class cities and villages).

NEW JERSEY. N.J. Rev. Stat. Ann. §§40:45-6, 40:45-8, 40:45-10 (municipal offices).

NEW MEXICO. N.M. Stat. Ann. §§1-22-10, 3-8-29 (municipal and school district offices).

NORTH DAKOTA. N.D. Cent. Code §§15-28-09, 16.1-11-08, 40-21-06 (municipal, county and school offices).

SOUTH DAKOTA. S.D. Codified Laws Ann. §§9-13-7, 9-13-21 (municipal offices).

VERMONT. Vt. Stat. Ann. title 17, §2681a (municipal offices).

WASHINGTON. Wash. Rev. Code §29.21.010 (city and some special purpose district offices).

WISCONSIN. Wis. Stat. Ann. §§5.58, 5.62, 59.12 (local offices and some county offices).

WYOMING. Wyo. Stat. §§22-22-304, 22-23-102 (municipal and school district offices).

Tier IV: *Local Nominations Selectively Nonpartisan/ State Nominations Partisan.*[2]

---

[2] The remaining states (Connecticut, Delaware, Florida, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota,

(Continued on following page)

ALABAMA. Ala. Code §11-46-3 (municipal offices in cities and towns of 300,000 or less).

ALASKA. Alaska Stat. §29.29.010 (optional for municipal offices).

ARIZONA. Ariz. Rev. Stat. Ann. §§9-821.01, 16-502 (school district offices; optional for municipal offices).

ARKANSAS. Ark. Stat. Ann. §§14-47-110, 14-48-110 (municipal offices in city-manager and city-administrator governments).

GEORGIA. Ga. Code Ann. §34-1016.2 (local school boards and school superintendents; optional for local offices).

IDAHO. Idaho Code §34-905A (highway district commissioners).

ILLINOIS. Ill. Rev. Stat. title 46, §§10-3, 16-4.1 (school district offices; optional for municipal offices).

IOWA. Iowa Code §39.21 (regional library trustees, county public hospital trustees and soil and water conservation district commissioners; optional for local offices).

KENTUCKY. Ky. Rev. Stat. Ann. §§83A.050, 83A.170 (municipal offices in city manager governments; optional for municipal offices in non-city manager governments).

(Continued from previous page)

Mississippi, Missouri, New York, Pennsylvania, Rhode Island, Texas and Virginia) provide for partisan nominations of local officers in their statutory schemes.

MARYLAND. Md. Elec. Code Ann. §32-2 (county boards of education).

MONTANA. Mont. Code Ann. §§7-3-219, 7-3-314, 7-3-413, 7-3-513, 7-3-603, 7-3-704, 7-3-4341 (town meeting governments and municipal commission-manager governments; optional for other forms of local government).

NEVADA. Nev. Rev. Stat. Ann. §293.195 (state board of education, school district trustees, county sheriff and public hospital trustees).

NEW HAMPSHIRE. N.H. Rev. Stat. Ann. §§669.13, 670.7, 671:20, 671:30 (school district offices; optional for city, town and village offices).

NORTH CAROLINA. N.C. Gen. Stat. §115C-37 (boards of education; optional for local offices).

OHIO. Ohio Rev. Code Ann. §3505.04 (state and local boards of education; optional for municipalities and townships).

OKLAHOMA. Okla. Stat. title 11, §16-105.1 (school offices; optional for municipalities).

OREGON. Or. Rev. Stat. §249.002 (school superintendents, executives of metropolitan service districts, justices of the peace, sheriffs and district attorneys).

SOUTH CAROLINA. S.C. Code Ann. §5-15-60 (optional for municipalities).

TENNESSEE. Tenn. Code Ann. §6-31-104 (municipal officers in city manager governments).

UTAH. Utah Code Ann. §20-7-5 (state and district boards of education, cemetery maintenance commissioners).

WEST VIRGINIA. W. Va. Code §3-5-6 (boards of education).

APPENDIX B

Comparison of Statutory Advantages
Granted to Official Political Parties
In States With Nonpartisan
Local Nomination Procedures[1]

TIER I: *All Local Nominations Nonpartisan/State Nominations Partisan.*

CALIFORNIA provides for party enrollment as part of the voter registration process. County central committees may submit party contributor envelopes or one-page solicitation letters to be mailed at public expense by the county with the sample ballots. The state provides meeting places for county central committees. County clerks are required to prepare at public expense sample ballots for political parties in primary elections and mail those ballots to the voters. County clerks must also furnish state and county central committees with printed indices of registered voters without charge. The state collects contributions of up to 25 dollars on behalf of official parties as an option on all California personal income tax returns. Cal. Elec. Code §§501, 605, 8920, 9420, 9730, 9840, 10007, 10010.5; Cal. Rev. & Tax. Code §§18701 *et seq.*

TIER II: *All Local Nominations Nonpartisan/State Nominations Nonpartisan.*

LOUISIANA does not provide official parties with any specific statutory advantages.

---

[1] All the states, except Louisiana, also provide the official parties with the advantages associated with ballot access through the state primaries.

TIER III: *Local Nominations Generally Nonpartisan/State Nominations Partisan.*

MAINE allows party enrollment as part of registration. Registrars must supply party caucuses with voting lists at the city's expense. Me. Rev. Stat. Ann. title 21-A, §§141, 312.

VERMONT mails a copy of the voting list to the local party chair. Vt. Stat. Ann. title 4, §2141.

WASHINGTON allows nominees of each party for president and vice president to submit one page for candidates' pamphlet at the state's expense. Wash. Rev. Code Ann. §29.80.050.

WYOMING provides for mailing of a copy of voter registration lists to the chairperson of each political party 10 days before the election. Wyo. Stat. §22-3-109.

COLORADO, NEBRASKA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, and WISCONSIN do not provide official parties with any specific statutory advantages.

TIER IV: *Local Nominations Selectively Nonpartisan/State Nominations Partisan.*

ALABAMA collects voluntary contributions to official parties through personal income tax returns. The parties may also obtain all voter information in the possession of registrars. Ala. Code §§17-4-122, 40-18-146.

ARIZONA maintains a political parties trust fund, funded by an income tax refund checkoff. A party chairman may request one sample primary election ballot of

his or her party for each election precinct. Ariz. Rev. Stat. Ann. §§16-461, 16-807.

GEORGIA distributes a percentage of the candidates' qualification fee to state political parties. The state may reimburse a party for any or all of the costs of holding a primary. Ga. Code Ann. §§34-1013, 34A-909.

IDAHO provides public funding for campaigns through an income tax checkoff. Idaho Code §§34-2504 *et seq.*, 63-3089.

IOWA maintains an election campaign fund funded through an income tax liability checkoff. Iowa Code §§56.18-56.25.

KENTUCKY maintains an election campaign fund funded through an income tax checkoff. Ky. Rev. Stat. Ann. §§121.230, 141.071, 141.072.

NORTH CAROLINA provides for public financing of political parties through voluntary designations on personal income tax returns. N.C. Gen. Stat. §§105-159.1, 163-278.41 *et seq.*

OHIO maintains a political party fund funded through an income tax checkoff. Ohio Rev. Code Ann. §§3517.16, 3517.18.

OREGON provides parties with voter lists. Or. Rev. Stat. §§247.940, 247.945.

SOUTH CAROLINA provides the official parties with copies of voter lists for party primaries. S.C. Code Ann. §7-5-420.

ILLINOIS, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, TENNESSEE, UTAH

and WEST VIRGINIA do not provide official parties with any specific statutory advantages.

APPENDIX C

Comparison of Nonpartisan Judicial Election Procedures

This appendix groups the various states according to nonpartisan election procedures for judicial officers, as provided by statute.[1]

TIER I: *Nonpartisan Contested Elections.*[2]

---

[1] Eleven states provide for the partisan election of judges: Alabama (Ala. Const. Art. VI, §6.13, Ala. Code §§17-7-1, 17-16-20); Arkansas (Ark. Const. Art. 7, §§6, 17, Ark. Stat. Ann. §§7-5-208, 7-7-102, 7-7-103); Mississippi (Miss. Code Ann. §23-15-971); New Mexico (N.M. Const. Art. 6, §33); New York (N.Y. Const. Art. 6, §6, N.Y. Elec. Law §§6-100 *et seq.*, 7-104); North Carolina (N.C. Gen. Stat. §§7A-10, 163-140); Pennsylvania (Pa. Const. Art. 5, §13, Pa. Stat. Ann. title 25, §§2752, 2754); Tennessee (Tenn. Const. Art. 6, §4, Art. 7, §5, Tenn. Code Ann. §§2-13-203, 17-1-103); Texas (Tex. Const. Art. 5, §§2, 4, 6); West Virginia (W.Va. Const. Art. 8, §§3, 5, W.Va. Code §§3-1-16, 3-1-17, 3-5-7, 3-5-8); Wisconsin (Wis. Const. Art. 7, §§4, 7, Wis. Stat. Ann. §§5.58, 5.60, 5.62, 5.64). The remaining states appoint judges for life: Connecticut (Conn. Const. Art. V, §2); Delaware (Del. Const. Art. IV, §3); Hawaii (Haw. Const. Art. VI, §3; Maine (Me. Const. Art. 5, Pt. 1, §8, Art. 6, §4); Massachusetts (Mass. Const. Pt. 2, Ch. 3, Art. 1); New Hampshire (N.H. Const. Pt. 2, Arts. 46, 73); New Jersey (N.J. Const. Art. 6, §6); Rhode Island (R.I. Const. Art. 10, §4, R.I. Gen. Laws §8-2-2); South Carolina (S.C. Const. Art. 5, §§3, 8); Vermont (Vt. Stat. Ann. title 4, §603); Virginia (Va. Const. Art. VI, §7).

[2] Except as indicated in footnotes below, this category includes those states in which judicial officers are subject to contested elections, regardless of whether the incumbent was originally appointed or elected.

ARIZONA. Ariz. Const. Art. 6, §12 (superior court); Ariz. Rev. Stat. Ann. §16-502.[3]

CALIFORNIA. Cal. Const. Art. II. §6, Art. VI, §16.[4]

FLORIDA. Fla. Const. Art. 5, §15; Fla. Stat. §105.041.[5]

GEORGIA. Ga. Code Ann. §§34-1016.1, 34-1016.2.

IDAHO. Idaho Code §34-905.

KENTUCKY. Ky. Const. §117; Ky. Rev. Stat. Ann. §118A.060.

LOUISIANA. La. Rev. Stat. Ann. §§401 *et seq.*, 481 *et seq.*, 551.

MICHIGAN. Mich. Const. Art. 6, §§2, 8.

MINNESOTA. Minn. Const. Art. 6, §7; Minn. Stat. Ann. §204B.36.

MONTANA. Mont. Const. Art. VII, §; Mont. Code Ann. §13-14-115.[6]

---

[3] Arizona's supreme court and appellate justices are subject to retention elections. Ariz. Const. Art. 6, §38.

[4] California's supreme court and appellate justices are subject to retention elections. Cal. Const. Art. 6, §16. California prohibits political parties from endorsing, supporting or opposing candidates in judicial campaigns. Cal. Const. Art. II, §6.

[5] Florida prohibits political parties from endorsing, supporting or assisting candidates in judicial campaigns. Fla. Stat. Ann. §105.071. *But see, Concerned Democrats of Florida v. Reno,* 458 F.Supp. 60 (S.D. Fla. 1978).

[6] Some Montana judicial offices are only subject to retention elections. Mont. Const. Art. VII, §8. Montana prohibits political parties from endorsing or contributing to the campaigns of judicial candidates. Mont. Code Ann. §§13-35-231, 3-10-201.

NEBRASKA. Neb. Rev. Stat. §32-535.[7]

NEVADA. Nev. Rev. Stat. §293.195.

NORTH DAKOTA. N.D. Const. Art. VI, §9; N.D. Cent. Code §16.1-11-08.

OHIO. Ohio Rev. Code Ann. §3505.04.

OKLAHOMA. Okla. Const. Art. 7, §3; Okla. Stat. Ann. title 26, §11-108.

OREGON. Or. Rev. Stat. §249.002.

SOUTH DAKOTA. S.D. Const. Art. 5, §7.[8]

WASHINGTON. Wash. Const. Art. 4, §§3, 5; Wash. Rev. Code Ann. §29.21.070.

TIER II: *Non Partisan Retention Elections*

ALASKA. Alaska Const. Art. IV, §§5, 6; Alaska Stat. §§15.35.030, 15.35.053, 15.35.060, 15.35.100.

COLORADO. Colo. Const. Art. VI, §§20, 25.

ILLINOIS. Ill. Rev. Stat., chap. 46, para. 16-6.1.[9]

---

[7] Nebraska supreme court justices are appointed for life. Neb. Const. Art. V, §21.

[8] South Dakota's supreme court justices are subject to retention elections. S.D. Codified Laws Ann. §16-1-2. South Dakota prohibits parties from endorsing or nominating judicial candidates. S.D. Codified Laws Ann. §12-9-2.

[9] Illinois judges may be initially selected by appointment or partisan election. Ill. Const. Art. 6, §12.

INDIANA. Ind. Const. Art. 7, §§10, 11.[10]

IOWA. Iowa Code §§46.1 *et seq.*

KANSAS. Kan. Const. Art. 3. §6.[11]

MARYLAND. Md. Const. Art. IV, §§3, 5, 5A.[12]

MISSOURI. Mo. Const. Art. 5, §29.

NEW MEXICO. N.M. Const. Art. VI, §35.[13]

UTAH. Utah Const. Art. VIII, §§8, 9.

WYOMING. Wyo. Const. Art. 5, §4.

---

[10] Indiana elects circuit judges at a partisan primary. Ind. Const. Art. 7, §7; Ind. Code Ann. §3-8-2-5. The judges subsequently face retention elections. Ind. Code Ann. §3-10-2-8.

[11] Kansas provides for the optional nonpartisan election of district court judges. Kan. Const. Art. 3, §6.

[12] Circuit judges run in party primaries regardless of affiliation and the top three vote-getters are placed on the general election ballot.

[13] New Mexico judges may be initially selected by appointment or partisan election.

APPENDIX D

Comparison of Statutory Advantages Granted
to Official Political Parties In States
With Nonpartisan Judicial Election Procedures

TIER I: *Nonpartisan Contested Elections.*

ARIZONA maintains a political parties trust fund, funded by an income tax refund checkoff. A party chairman may request one sample primary election ballot of his or her party for each election precinct. Ariz. Rev. Stat. Ann. §§16-461, 16-807.

CALIFORNIA provides for party enrollment as part of the voter registration process. County central committees may submit party contributor envelopes or one-page solicitation letters to be mailed at the public expense by the county with the sample ballots. The county provides meeting places for the county central committee. County clerks are required to prepare at public expense sample ballots for political parties in primary elections and mail those ballots to the voters. County clerks must also furnish state and county central committees with printed indices of registered voters without charge. The state collects contributions of up to 25 dollars on behalf of official parties as an option on all California personal income tax returns. Cal. Elec. Code §§501, 605, 8920, 9420, 9730, 9840, 10007, 10010.5; Cal. Rev. & Tax. Code §§18701 *et seq.*.

GEORGIA distributes a percentage of the candidates' qualification fee to state political parties. The state may reimburse a party for any or all of the costs of holding a primary. Ga. Code Ann. §§34-1013, 34A-909.

KENTUCKY maintains an election campaign fund funded through an income tax checkoff. Ky. Rev. Stat. Ann. §§121.230. 141.071, 141.072.

MICHIGAN allows official parties to request the month and day of birth of voters to challenge voter eligibility. Nominees from official parties are entitled to a greater share of public campaign funds. Mich. Comp. Laws Ann. §§168.522, 169.265.

MINNESOTA gives all employees the right to be absent from work to attend party caucuses. No state or local agency, including schools and colleges, may hold a meeting or schedule an event for after 6:00 p.m. on the date of a precinct caucus. State and local agencies, including schools and colleges, must make their facilities available for party caucuses and conventions, at their lowest price. Minn. Stat. Ann. §§202A.19, 202A.192.

NORTH DAKOTA pays the expenses of delegates to political party national conventions up to $200 per delegate. N.D. Cent. Code §16.1-03-15.

OHIO maintains a political party fund funded through an income tax checkoff. Ohio Rev. Code Ann. §§3517.16, 3517.18.

OREGON provides parties with free access to voter lists. Or. Rev. Stat. §§247.940, 247.945.

WASHINGTON allows nominees of each party for president and vice president to submit one page for candidates' pamphlet at the state's expense. Wash. Rev. Code Ann. §29.80.050.

FLORIDA, IDAHO, LOUISIANA, MONTANA, NEBRASKA, NEVADA, OKLAHOMA and SOUTH

DAKOTA do not provide official parties with any specific statutory advantages.

TIER II: *Nonpartisan Retention Elections*

IOWA maintains an election campaign fund funded by an income tax liability checkoff. Iowa Code §§56.18-56.25.

WYOMING provides for mailing of a copy of voter registration lists to the chairperson of each political party 10 days before the election. Wyo. Stat. §22-3-109.

ALASKA, COLORADO, ILLINOIS, INDIANA, KANSAS, MISSOURI and UTAH do not provide official parties with any specific statutory advantages.

No. 90-769 (14)

Supreme Court, U.S.
FILED
MAY 14 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, CITY ATTORNEY FOR THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,
vs.
BOB GEARY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE APPENDICES AND PROPOSED APPENDICES OF RESPONDENTS AND AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, *ET AL.*

ARLO HALE SMITH
66 San Fernando Way
San Francisco, California 94127
Telephone: (415) 564-6091

Attorney for Respondents
Bob Geary, Robert Silvestri,
Dennis Mark, Melissa
Gundrun, Wayne Johnson,
David Soule, Max Woods,
Peter Johnson, Robert Gebert,
and Election Action

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 677-7000
* Counsel of Record

Counsel for Amici Curiae

CALIFORNIA DEMOCRATIC PARTY;
PHILLIP ANGELIDES,
Chair, California Democratic Party;
EDMUND G. BROWN, JR.,
Former Chair, California Democratic Party;
CALIFORNIA LIBERTARIAN PARTY;
[Other Amici listed on inside front cover]

41 pp

CONTINUED LISTING OF AMICI

GAIL LIGHTFOOT, Chair, California Libertarian Party; SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; CAROLE MIGDEN, Chair, San Francisco County Democratic Central Committee and Member, San Francisco Board of Supervisors; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; SAM HARPER, Chair, San Francisco County Republican Central Committee; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ROBERT FARRAN, Chair, Los Angeles County Democratic Central Committee; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; LIZ FIGUEROA, Chair, Alameda County Democratic Central Committee; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; STEPHEN STAMM, Chair, Santa Clara County Democratic Central Committee; MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE; DAVID STRAND, Former Chair, Marin County Democratic Central Committee; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; RON ARRANTS, Chair, Solano County Democratic Central Committee; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; THOMAS ROMERO, Chair, Placer County Democratic Central Committee; CAROL SHERMAN, Mayor of Fairfax; WENDY BAKER, Councilwoman and Former Mayor of Fairfax; NANCY L. PARENT, Councilwoman and Former Mayor of Pittsburg; EDDIE SOUZA, Mayor of Santa Clara; LAWRENCE E. STONE, Councilman and Former Mayor of Sunnyvale; DENNIS ZANE, Councilman and Former Mayor of Santa Monica; LIBBY DENEBEIM, Member, San Francisco Board of Education; MARY KING, Member, Alameda County Board of Supervisors; NATIONAL COMMITTEE FOR PARTY RENEWAL; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; PROFESSOR EDMOND COSTANTINI; AND PROFESSOR EUGENE C. LEE.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE APPENDICES

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. DISCUSSION 2

III. CONCLUSION 5

PROPOSED APPENDICES

APPENDIX 1 (Matrix of So-Called "State-Conferred Advantages") ..... App. 1

APPENDIX 2 (Summary of So-Called "State-Conferred Advantages") ..... App. 9

TABLE OF AUTHORITIES

Page(s)

Cases

Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) 2,3

Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) 4

Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 947 (1991) 5

Kamen v. Kemper Fin. Servs., 59 U.S.L.W. 3723 (1991) 4,5

Larkin v. Grendel's Den, Inc., 459 U.S. 941 (1982) 5

Lau v. Nichols, 414 U.S. 563 (1974) 5

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 4

McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) 5

Nevada v. United States, 462 U.S. 1104 (1983) 5

Ohio Bureau of Employment Servs. v. Hodory, 430 U.S. 963 (1977) 5

San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) 4

Statutes and Rules

Sup. Ct. R. 25.6 5

No. 90-769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE APPENDICES TO BRIEFS OF RESPONDENTS AND AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, ET AL.

I. INTRODUCTION

Respondents and Amici Curiae California Democratic Party and California Libertarian Party, *et al.* hereby request the Court's leave to file the attached Appendices. These Appendices set forth the so-called "statutory advantages" provided to political parties by each of the fifty states.

Respondents and Amici are compelled to file these Appendices by Petitioners' inclusion in their Reply Brief[1] of a chart purporting to compare all "advantages" conferred by the various states on political parties (Petitioners' Reply Brf. Appendix B), and Petitioners' conclusion therefrom that Article II, Section 6(b) of the California Constitution is justified because California confers more so-called "statutory advantages" on political parties than any other state. Petitioners' Reply Brf. 15.

Following oral argument, Respondents and Amici conducted a time-consuming survey of the laws relating to elections and political parties in all fifty states and discovered numerous errors and omissions in Petitioners' Appendix B. The 50-state survey reveals that Petitioners' premise – that "the statutory benefits California gives its political parties are greater than those in any other state" (Petitioners' Reply Brf. 15) – is simply incorrect. It turns out that every state provides its parties so-called "advantages," and that California does not stand out. Indeed, California fails to provide its parties several "advantages" that are provided in other states, including what is arguably the most significant "advantage," public financing of political parties and of political candidates.

II. DISCUSSION

Petitioners' justification of section 6(b)'s absolute ban on political speech depends largely on their comparison between the so-called "state-conferred advantages" in California and those in other states. As set forth in their Briefs on the Merits, Respondents and Amici respectfully submit that Petitioners' state-conferred advantage conceptual framework is totally irrelevant to this case.[2]

1 Petitioners' Reply Brief was received by Respondents and Amici on April 19 and April 18, 1991, respectively

2 Petitioners' conceptual framework depends exclusively upon a flawed analogy to *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990). *Austin* is readily distinguishable: (1) the reasoning of *Austin* does not reach unincorporated associations; (2) *Austin* does not reach corporations which are "more akin to voluntary political associations than business firms", and a political party is the paradigm of the "voluntary political association"; and (3) *Austin* upheld only a *limited restriction* on independent campaign *expenditures*, whereas Section 6(b) imposes a *total ban* on *political speech*.

However, even accepting *arguendo* Petitioners' conceptual framework, the 50-state survey reveals that a central premise of Petitioners' argument – that "the statutory benefits California gives its political parties are greater than those in any other state" (Petitioners' Reply Brf. 15) – is incorrect. The 50-state survey reveals that: (1) *every* state provides so-called "statutory advantages" to its political parties, and California does not stand out with regard to the quantity of "advantag[es]" enumerated in state statutes; (2) California does not stand out from the other states with regard to its funding of primary elections, because 49 of the 50 states have such provisions; and (3) California fails to provide its parties several "advantages" that are provided by other states, including what is arguably the most significant "advantage" – public financing of political parties and of political candidates.[3] Thus, Petitioners' chart entitled "Comparison of Statutory Advantages" should be

3 "Advantages" not provided by California, but provided to parties in other states, include the following:

(1) Income tax form "check-off" provision allowing taxpayer to earmark state funds to political parties with no increase in the taxpayer's liability (7 states);

(2) Tax deductions for party contributions (5 states);

(3) Political parties appoint or nominate election inspectors, judges, or poll watchers (31 states);

(4) Voters have the option to vote a straight party ticket in the general election (10 states);

(5) Vacancies in the legislature are filled by the political party of the former officeholder; or by the governor, who chooses from a list of nominees submitted by the party; or by legislators in the same party as the former officeholder (14 states); and

(6) The name of the party is protected by law from unauthorized use (5 states).

disregarded as incomplete and inaccurate[4] and Petitioners' arguments concerning the so-called "state-conferred advantages" should be rejected.[5]

Respondents and Amici submit that it is appropriate for the Court to accept their Appendices in order to have an accurate catalogue of the so-called "statutory advantages" and in order to have an accurate comparison of California with the 49 other states. The Court has accepted post-argument filings of counsel. *See, e.g., Kamen v. Kemper Fin.*

---

4 A comparison of Respondents'/Amici's Appendices with Petitioners' chart entitled "Comparison of Statutory Advantages" (Petitioners' Reply Brf. Appendix B) reveals extensive omissions and inaccuracies in Petitioners' submissions. Petitioners' Appendix inexplicably excludes several "advantages" altogether from its ambit, lists "advantages" for some states but omits listing those same "advantages" for other states, and omits any reference whatsoever to the "advantages" in those 18 states which have exclusively partisan nomination procedures.

Petitioners even list 17 states as not "provid[ing] official parties with any specific statutory advantages" (Petitioners' Reply Brf. Appendix B). As shown in Respondents'/Amici's Appendices, however, each of these 17 states confers statutory "advantages" on political parties.

Petitioners' Appendix D is substantially similar to their Appendix B and is discredited for all the reasons set forth above.

5 The fact that the statutes of all 50 states provide so-called "advantages" to political parties does not detract in any way from the judiciary's longstanding view of political parties as voluntary political associations of individuals. "[W]e would reject the State's premise that a state can strip a voluntary political association of First Amendment rights by legislating it into an arm of the State." *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 825-26 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989), citing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533-34 & n.1 (1980). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) (describing New York State Democratic Party as a "private, voluntary political association[]").

Moreover, some of the so-called "advantages" articulated by Petitioners are of questionable value, others are more accurately seen as "advantages" to the state or the general electorate, and others were imposed upon the parties by the state as part of a larger package of regulations.

Servs., 59 U.S.L.W. 3723 (1991) (supplemental brief); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 947 (1991) (supplemental brief); *Ohio Bureau of Employment Servs. v. Hodory*, 430 U.S. 963 (1977) ("additional material"); *Nevada v. United States*, 462 U.S. 1104 (1983) (supplemental memorandum); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 941 (1982) (supplemental statement). *See also* Sup. Ct. R. 25.6. In a situation similar to the instant case, the Court accepted and relied upon a survey of state election laws filed after oral argument. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 810-11 n.9 (1969) (Court compared Illinois' election laws to those of other states, utilizing survey of state statutes submitted after oral argument); *see also Lau v. Nichols*, 414 U.S. 563, 564 n.1 (1974) (citing report submitted to the Court after oral argument showing number of Chinese-speaking students in the San Francisco school system).

III. CONCLUSION

For the foregoing reasons, Respondents and Amici respectfully request that the Court grant their Motion for Leave to File Appendices.

Dated: May 13, 1991

Respectfully submitted,

ARLO HALE SMITH
Attorney for Respondents

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER
* Counsel of Record
Attorneys for Amici Curiae

PROPOSED APPENDICES TO BRIEFS
OF RESPONDENTS AND AMICI CURIAE
CALIFORNIA DEMOCRATIC PARTY AND
CALIFORNIA LIBERTARIAN PARTY, ET AL.

APPENDIX 1
Matrix of So-Called "State-Conferred Advantages"

	State Pays for Primary Elections [1]	State Monies Given to Parties [2]	State Monies Given to Campaign Fund [2]	Tax Deduction for Political Contributions [3]	Tax Form Facilitates Pol. Contributions [4]	Voter List Provided to Parties [5]	State Disseminates Sample Ballot [6]
Alabama	✗				✗	✗	
Alaska	✗						
Arizona	✗			✗	✗	✗	✗
Arkansas	✗						
California	✗				✗	✗	✗
Colorado	✗						
Conn.	✗					✗	
Delaware	✗					✗	
Florida	✗					✗	✗
Georgia	✗						
Hawaii	✗		✗	✗			
Idaho	✗	✗					
Illinois	✗						
Indiana	✗						
Iowa	✗	✗					✗
Kansas	✗						
Kentucky	✗	✗					
Louisiana	✗						
Maine	✗				✗	✗	
Maryland	✗						✗
Mass.	✗				✗	✗	
Michigan	✗		✗				
Minn.	✗	✗	✗				
Mississippi	✗						
Missouri	✗						✗

	Party Enrollment Upon Registration [7]	Filing Fees Remitted To Parties [8]	Parties Help Select State Board of Elections [9]	Parties Help Select Election Inspectors [10]	Straight Party Ticket Voting [11]	Parties Help Fill Legislative Vacancies [12]	Name Protection for Parties [13]	Voting Machine Installation [14]	Other [15]
Ala.			✗	✗					
Alaska			✗		✗				
Ariz.	✗		✗				✗		
Ark.			✗				✗		
Calif.	✗						✗	✗	
Colo.	✗		✗		✗				
Conn.	✗		✗				✗		
Del.		✗	✗					✗	
Fla.	✗	✗				✗			
Ga.		✗	✗	✗	✗		✗	✗	
Haw.			✗					✗	
Idaho			✗		✗				
Ill.			✗		✗				
Ind.			✗	✗	✗	✗			✗
Iowa	✗								
Kan.	✗		✗						
Ky.			✗	✗					
La.	✗								
Me.	✗								
Md.			✗		✗	✗	✗		
Mass.	✗								
Mich.	✗				✗				
Minn.			✗				✗	✗	
Miss.									
Mo.		✗		✗				✗	

	State Pays for Primary Elections[1]	State Monies Given to Parties[2]	State Monies Given to Campaign Fund[2]	Tax Deduction for Political Contributions[3]	Tax Form Facilitates Pol. Contributions[4]	Voter List Provided to Parties[5]	State Disseminates Sample Ballot[6]
Montana	✗			✗	✗		✗
Nebraska	✗					✗	✗
Nevada	✗					✗	✗
New Hamp.	✗						
New Jersey	✗		✗				✗
New Mexico	✗					✗	✗
New York	✗					✗	✗
North Carolina	✗				✗	✗	✗
North Dakota	✗						
Ohio	✗	✗					
Oklahoma	✗			✗			✗
Oregon	✗			✗	✗	✗	✗
Pennsylvania	✗						
Rhode Island	✗	✗	✗			✗	
South Carolina						✗	
South Dakota	✗					✗	✗
Tennessee	✗						✗
Texas	✗					✗	
Utah	✗	✗					✗
Vermont	✗					✗	
Virginia	✗				✗		
Washington	✗						
West Virginia	✗						
Wisconsin	✗		✗				
Wyoming	✗					✗	✗

	Party Enrollment Upon Registration[7]	Filing Fees Remitted To Parties[8]	Parties Help Select State Board of Elections[9]	Parties Help Select Election Inspectors[10]	Straight Party Ticket Voting[11]	Parties Help Fill Legislative Vacancies[12]	Name Protection for Parties[13]	Voting Machine Installation[14]	Other[15]
Mont.			✗		✗	✗			
Neb.	✗		✗						
Nev.		✗					✗	✗	
N.H.	✗		✗						
N.J.							✗	✗	
N.M.	✗		✗				✗		
N.Y.	✗		✗				✗		
N.C.		✗	✗		✗				
N.D.			✗						
Ohio	✗				✗				
Okla.	✗								
Or.	✗				✗	✗	✗		
Pa.	✗		✗	✗					
R.I.	✗			✗		✗			
S.C.				✗					
S.D.		✗							
Tenn.		✗	✗						
Tex.			✗						
Utah					✗				
Vt.									
Va.		✗	✗				✗		
Wash.			✗		✗			✗	
W.Va.	✗		✗	✗	✗		✗		
Wis.				✗					
Wyo.	✗		✗		✗		✗		

Notes to Appendix 1

1. All 50 states, with the exception of South Carolina, provide funds to pay all or part of the expenses of party primary elections.

2. "Check-off" provisions on state income tax forms allow the taxpayer to earmark a portion of his tax liability for either the political party of his choice or a general campaign fund. The state diverts a portion of its tax revenue to the designated party fund, which is one mode of public financing. (California does not have this provision.)

3. Some states allow an income tax deduction for political contributions to parties. The amount of the allowed deduction ranges from 25 to 100 dollars. Since the tax deduction decreases the taxpayer's tax liability and decreases the tax revenues the state otherwise would have received, this is a form of public financing. (California does not have this provision.)

4. Some states, including California, have an "add-on" provision on their state income tax forms, which provides taxpayers the opportunity to contribute either to a general campaign fund or to the political party of their choice. By participating, the taxpayers agree to *add* the chosen amount to their tax check or else deduct it from their expected refund. This "add-on" provision, in contrast to the "check-off" and tax deduction provisions described in Notes 2 and 3 above, is not a form of public financing for the parties or political candidates, because the "add-on" amount comes directly from the taxpayer with no decrease in the taxpayer's tax liability and with no impact on the state's general treasury.

5. Lists of registered voters are made available to political parties free of charge. Rhode Island is shown as providing this advantage because, although Rhode Island charges political parties a fee for providing these lists, only

political parties and candidates are allowed access to the lists.

6. Some states, at state expense, disseminate sample primary ballots to registered voters, either by mail or by publication in a newspaper of general circulation.

7. Upon registering to vote, a voter may affiliate with the political party of his choice.

8. Filing fees paid by political candidates are remitted, in whole or in part, to the candidate's political party. (California does not have this provision.)

9. In some states, political parties determine at least the majority of the membership of state boards of election. (California does not have this provision.)

10. Election inspectors, judges, clerks and/or poll watchers are either appointed or nominated by party central committees or chairmen. (California does not have this provision.)

11. When voting in a general election, an elector may vote for every candidate listed under a party label by simply marking a box next to the party name or by pulling a lever designated for that party. This facilitates "straight party ticket" voting. (California does not have this provision.)

12. State legislative vacancies are filled in one of the following ways: 1) the political party of the former officeholder appoints a replacement; 2) the governor chooses a replacement from a list of names submitted by the political party of the former officeholder; or 3) elected officials affiliated with the same political party as the former officeholder choose or confirm a replacement. *See River-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 5-6 n.4 (1982). (California does not have this provision.)

13. Names of political parties are protected from unauthorized use by others. (California does not have this provision.)

14. Political parties are allowed to have representatives present at the preparation, testing, and/or installation of voting machines.

15. The following states provide political parties with the other advantages enumerated below:

California: Counties provide meeting places for party county central committees.

Delaware: The two major political parties may appoint a special officer to regulate admission to the polling place.

Georgia: Party executive committees may petition the county superintendent to alter voting precincts.

Hawaii: Parties are entitled to inspect facsimiles of ballots prior to all elections.

Indiana: Money from sale of personalized license plates distributed to political parties.

Massachusetts: Provides campaign financing for primary candidates for primary offices.

Minnesota: Provides mandatory employee leave from work, access to public facilities and interruption of municipal proceedings for political party caucuses. Also provides mandatory leave from work to attend party central committee an executive committee meetings.

Nevada: County Clerk must notice primary election in a newspaper of general circulation.

New Jersey: Notice of primary is published in a newspaper of general circulation.

Washington: Party candidates for president and vice president are entitled to one page in the candidates' pamphlet free of charge.

APPENDIX 2
Summary of So-Called "State-Conferred Advantages"

Alabama

1. Money from county treasury used to cover expenses of primary elections (Ala. Code § 17-16-10).
2. "Add on" provision allows for state income taxpayers to contribute to the political party of their choice (Ala. Code § 40-18-146).
3. Political parties are authorized to obtain lists of registered voters (Ala. Code § 17-4-122).
4. Parties furnish lists from which election inspectors are appointed (Ala. Code §§ 17-6-6, 17-6-8).
5. Electors can vote a straight party ticket (Ala. Code § 17-8-15).

Alaska

1. Pays for primary elections (Alaska Stat. § 15.25.090).
2. Parties furnish lists from which election judges and clerks are chosen (Alaska Stat. § 15.10.150).
3. Party committees may appoint one or more persons as watchers in each precinct or counting center for any election (Ala. Stat. § 15.10.170).
4. Vacancies in the state legislature are filled by the appointment of the governor, subject to approval by legislators of the political party of the former office – holder (Alaska Stat. §§ 15.40.320 to 15.40.330).

Arizona

1. Expenses of primary election paid for by the city or county (Ariz. Rev. Stat. Ann. §§ 16-509, 16-511).

Arizona

1. Expenses of primary election paid for by the city or county (Ariz. Rev. Stat. Ann. §§ 16-509, 16-511).
2. Contributions to state committees of political parties are allowed as a deduction in computing state income tax (Ariz. Rev. Stat. Ann. § 43-1059).
3. There is a political party trust fund, funded by a state income-tax "add on" designated for political parties (Ariz. Rev. Stat. Ann. §§ 16-807, 43-612).
4. The county recorder provides lists of registered voters to the parties free of charge (Ariz. Rev. Stat. Ann. § 16-168).
5. Sample primary ballots are mailed by the government at government expense to all households with registered party members (Ariz. Rev. Stat. Ann. § 16-461).
6. Voter registration provides for party enrollment (Ariz. Rev. Stat. Ann. § 16-152).
7. County recorders rely on party chairmen for lists of potential deputy registrars (Ariz. Rev. Stat. Ann. § 16-132).
8. Parties allowed to have inspectors present at the vote count (Ariz. Rev. Stat. Ann. § 16-603).
9. Parties allowed one representative at location of voting machine preparations (Ariz. Rev. Stat. Ann. § 16-425).

Arkansas

1. Allows for primary expenses to be paid with public funds if the quorum court provides funding (Ark. Stat. Ann. §§ 7-3-01, 7-8-203).
2. County chairs or their designated appointee are given seats on the county boards of election commissioners (Ark. Stat. Ann. § 7-4-102).

3. Parties are allowed inspectors at regular and absentee vote count (Ark. Stat. Ann. §§ 7-5-316, 7-5-416).

4. Political parties are allowed representatives at the preparation of voting machines (Ark. Stat. Ann. § 7-5-611).

California

1. Counties and/or cities pay election expenses (Cal. Elec. Code § 10000).

2. "Add-on" provision allows for state income taxpayers to contribute to the political party of their choice (Cal. Rev. & Tax. Code §§ 18701-18702.)

3. Parties are entitled to receive, free of charge, lists of registered voters (Cal. Elec. Code § 10010.5).

4. County clerks prepare sample ballots and mail them to registered voters (Cal. Elec. Code § 10007).

5. Voter registration process allows for party enrollment (Cal. Elec. Code § 501).

6. Party Central Committee makes nominations to election precinct board (Cal. Elec. Code § 1639).

7. Parties are allowed representatives at preparation of voting machines (Cal. Elec. Code § 15320).

8. Counties provide meeting places for Party County Central Committees (Cal. Elec. Code §§ 8920, 9420, 9730, 9840).

Colorado

1. Pays for primary elections (Colo. Rev. Stat. § 1-4-101).

2. Voter registration process allows for party enrollment (Colo. Rev. Stat. § 1-2-203).

3. County party chairmen submit names of election judges (Colo. Rev. Stat. §§ 1-5-101, 1-5-107).

4. Sudden vacancies in the state legislature are filled by the party of the former officeholder (Colo. Rev. Stat. § 1-12-103).

Connecticut

1. Expenses of primaries are paid by the state and/or municipality (Conn. Gen. Stat. §§ 9-29, 9-239, 9-273, 9-441).

2. Registrar provides to the parties lists of registered voters free of charge (Conn. Gen. Stat. § 9-55).

3. Voter registration allows for party enrollment (Conn. Gen. Stat. § 9-20).

4. Party chairmen submit lists of persons to be designated "unofficial checkers" at municipal elections (Conn. Gen. Stat. § 9-235).

5. Party chairmen allowed to be present (or designate a representative) at installation of voting machines (Conn. Gen. Stat. § 9-244).

Delaware

1. Pays for primary elections (Del. Code Ann. tit. 15 § 3111).

2. List of registered voters are sent to the parties free of charge (Del. Code Ann. tit. 15 § 307).

3. Candidates for public office must submit the required filing fee to the department of elections in the form of a check payable to their political party (Del. Code Ann. tit. 15 § 3106).

4. All election officers and registration officers are chosen from lists submitted by executive committees of the "2 principal political parties" (Del. Code Ann. tit. 15 §§ 4701, 1501).

5. The Democratic and Republican parties may appoint a special officer to regulate admission to the polling place (Del. Code Ann. tit. 15 § 4935).

Florida

1. Primary expenses are paid for by the state and/or county (Fla. Stat. Ann. § 100.011)
2. Lists of registered voters are made available to political parties (Fla. Stat. Ann § 98.211).
3. Sample ballot either published in newspaper of general circulation or sent to electors (Fla. Stat. Ann. § 101.20).
4. Registration allows for party enrollment (Fla. Stat. Ann. § 98.111).
5. Florida allows for 85% of campaign filing fees to be remitted to state party executive committees (Fla. Stat. Ann. § 99.103).
6. Names of political parties protected from unauthorized use (Fla. Stat. Ann. § 103.081).

Georgia

1. Mandates that counties pay for all primaries (Ga. Code Ann. § 21-2-156).
2. A portion of a candidate's qualifying fee is retained by the political party of the candidate (Ga. Code Ann. § 21-2-131).
3. Political parties designate members to serve on State Election Board (Ga. Code Ann. § 21-2-30).
4. Parties may designate two poll watchers (independent candidates may designate one) for each polling place (Ga. Code Ann. § 21-2-408).
5. Parties nominate precinct managers to be appointed by the superintendent of elections (Ga. Code Ann. § 21-2-90).
6. Electors can vote a straight party ticket (Ga. Code Ann. § 21-2-285).
7. Parties allowed to have representatives inspect voting machines prior to use (Ga. Code Ann. § 21-2-327).

8. Party county executive committee may petition county superintendent to alter voting precincts (Ga. Code Ann. § 21-2-262).

Hawaii

1. Pays for primary elections (Haw. Rev. Stat. §§ 11-1, 11-181 to 11-184).
2. Provides matching funds for primary candidates (Haw. Rev. Stat. §§ 11-217 to 11-220).
3. "Check-off" provision allows state income taxpayers to designate two dollars (four for joint filing) otherwise liable as tax to be paid into the Hawaii Election Campaign Fund (Haw. Rev. Stat. § 235-102.5).
4. Contributions to party central or county committees are tax deductible (Haw. Rev. Stat. § 235-7).
5. Parties may appoint one poll watcher in every precinct in which their candidates are on the ballot (Haw. Rev. Stat. § 11-77).
6. Parties are entitled to inspect facsimiles of ballots prior to all elections (Haw. Rev. Stat. § 11-116).

Idaho

1. Idaho pays for the preparation and printing of primary ballots (Idaho Code § 34-713).
2. A "check-off" provision allows for state income tax money to go to political parties (Idaho Code § 63-3088).
3. Parties nominate election judges (Idaho Code § 34-303).
4. Parties may appoint one poll watcher for each polling place (Idaho Code § 34-304).
5. Vacancies in the legislature are filled by the governor who chooses from a list provided by the former officeholder's party (Idaho Code § 59-904A).

Illinois

1. Counties pay for primary elections (Ill. Rev. Stat. Ch. 46 ¶¶ 7-6, 17-30).
2. Parties may appoint one poll watcher per precinct (Ill. Rev. Stat. Ch. 46 ¶ 7-34).
3. Vacancies in the state legislature are filled by the political party of the former officeholder, which appoints a replacement (Ill. Rev. Stat. Ch. 46 ¶ 25-6).

Indiana

1. Pays for primary election (Ind. Code Ann. §§ 3-5-3-1 to 3-5-3-11).
2. Money from sale of "vanity" license plates distributed to political parties (Ind. Code Ann. § 9-7-5.5-8).
3. Party committee chairmen nominate members to the state and county election boards (Ind. Code Ann. §§ 3-6-4-4, 3-6-5-5).
4. Party chairmen nominate election judges, election sheriffs, poll clerks and election officers (Ind. Code Ann. §§ 3-6-6-9, 3-6-6-10).
5. Electors can vote a straight party ticket (Ind. Code Ann. § 3-11-5-10).
6. The party of the former legislator designates that legislator's replacement (Ind. Code Ann. §§ 3-13-5-1).

Iowa

1. Cities and counties pay for primary elections (Iowa Code §§ 43.118, 47.3).
2. State provides for "check-off" for state income tax filers to designate a portion of their taxes to a political party (Iowa Code §§ 56.18, 56.19).
3. County commissioner must publish sample ballots in not less than two newspapers prior to the day of the primary election (Iowa Code § 43.29).

4. Voter registration permits party enrollment (Iowa Code § 48.6).
5. Parties designate members of the election board (Iowa Code § 49.15).

Kansas

1. State and/or counties pay for primary elections (Kan. Stat. Ann. §§ 25-119, 25-223, 25-2201).
2. Voter registration allows for party enrollment (Kan. Stat. Ann. § 25-3306).
3. County party chairmen designate election judges and clerks (Kan. Stat. Ann § 25-2803).

Kentucky

1. Pays for primary elections (Ky. Rev. Stat. Ann. § 117.345).
2. Provision of state income tax "check-off" of up to two dollars (four for joint returns) to be paid to a political party designated by the taxpayer (Ky. Rev. Stat. Ann. §§ 121.230, 141.071).
3. Political parties submit lists of candidates for State Election Board (Ky. Rev. Stat. Ann. § 117.015).
4. Political parties may have representatives present at both the count and re-canvassing of election totals (Ky. Rev. Stat. Ann. §§ 117.275, 117.305).

Louisiana

1. Pays for primaries (La. Rev. Stat. Ann. §§ 18:1400.5, 1400.6)
2. Registration allows for party enrollment (La. Rev. Stat. Ann. § 18:104).

Maine

1. The state and/or municipalities pays for primary elections (Me. Rev. Stat. Ann. tit. 21-A § 633).

2. "Add-on" state income tax provision allowing for individual contribution of one, five, ten, or more dollars to be donated to political parties (Me. Rev. Stat. Ann. tit. 36 § 5283).

3. When calling the biennial municipal caucus, political parties are entitled to lists of registered voters free (Me. Rev. Stat. Ann. tit. 21-A § 312).

4. Voter registration allows for party enrollment (Me. Rev. Stat. Ann. tit. 21-A § 141).

Maryland

1. Pays for primary elections (Md. Ann. Code art. 33, § 2-4).

2. Lists of candidates for nomination are published in newspapers (Md. Ann. Code art. 33, § 8-5).

3. Parties may designate a challenger and watcher at each place of registration and election (Md. Ann. Code art. 33, § 15-3).

4. In the case of a sudden vacancy in the state legislature, the governor appoints a replacement chosen from a list submitted by the political party of the former officeholder (Md. Const. art. 3 § 13).

5. Criminalizes an organization's holding itself out as the official governing body of a party (Md. Ann. Code art. 33, § 11-3).

6. Representatives of political parties may be present to see that voting machines are in proper condition (Md. Ann. Code art. 33, § 16-9).

Massachusetts

1. State and/or municipality pays for ballots, voting machines, and other primary expenses. (Mass. Gen. Laws Ann. Ch. 50 § 1, Ch. 53 § 93).

2. When holding a caucus, ward and town committees may request, free of charge, lists of registered voters (Mass. Gen. Laws Ann. Ch. 51 § 62).

3. "Add-on" provision allowing state income taxpayers to contribute one dollar to the state campaign fund (Mass. Gen. Law Ann. Ch. 62 § 6C).

4. Voter registration allows for party enrollment (Mass. Gen. Law Ann. Ch. 51 § 36).

5. Political parties submit lists of persons from which are chosen members of board of registrars and election commissioners (Mass. Gen. Law Ann. Ch. 51 §§ 15, 16A).

Michigan

1. Pays for primaries (Mich. Comp. Laws Ann. § 168.670).

2. "Check-off" provision allows state income tax filers to designate two dollars of their tax payment for the state campaign fund (Mich. Comp. Laws Ann. § 169.261).

3. Voter registration allows for party enrollment (Mich. Comp. Laws Ann. § 168.495).

4. Elector can vote a straight party ticket (Mich. Comp. Laws Ann. § 168.737).

Minnesota

1. Pays for primaries (Minn. Stat. Ann. § 204B.32).

2. "Check-off" provision allows taxpayers to designate that five dollars be paid from the general state fund either to the state elections campaign fund or to the political party of their choice (Minn. Stat. Ann. § 10A.31).

3. County or legislative party chairs designate election judges (Minn. Stat. Ann. § 204B.21).

4. Parties may view preparation of voting machines and certify adequacy of preparation (Minn. Stat. Ann. § 206.73).

5. Provides mandatory employee leave from work, access to public facilities, and interruption of municipal proceedings for political party caucuses (Minn. Stat. Ann. § 202A.19).

6. Provides mandatory leave from work to attend party state central committee or executive committee meetings (Minn. Stat. Ann. § 202A.135).

Mississippi

1. Pays for primaries (Miss. Code Ann. §§ 23-15-301, 23-15-311).

Missouri

1. Pays for primaries (Mo. Ann. Stat. §§ 79.035, 115.061, 115.063, 115.065, 115.785 (Vernon)).
2. Election authority is to publish a list of primary candidates in a newspaper of general circulation (Mo. Ann. Stat. § 115.389 (Vernon)).
3. Filing fees are paid to the party (Mo. Ann. Stat. § 115.357 (Vernon)).
4. In some counties, election judges are chosen from lists provided by political parties (Mo. Ann. Stat. § 115.087 (Vernon)).
5. Parties may have representatives present at testing of voting machines (Mo. Ann. Stat. § 115.233 (Vernon)).

Montana

1. Pays for primaries (Mont. Code Ann. § 13-1-302).
2. In computing net income for income tax purposes, a taxpayer is allowed as a deduction political contributions in an amount not to exceed $100 (Mont. Code Ann § 15-30-121).
3. "Add-on" provision in the state income tax allows individuals to contribute one dollar (two for a joint filing) to the state public campaign fund (Mont. Code Ann. §§ 13-37-303 to 13-37-304).
4. Election administrators must print sample ballots "sufficient to answer requests" of political parties (Mont. Code Ann. § 13-12-214).

5. Election judges chosen from lists submitted by party committees (Mont. Code Ann. § 13-4-102).
6. Political parties may request the appointment of deputy registrars and submit lists for such appointments (Mont. Code Ann. § 13-2-102).
7. Vacancies in the state legislature are filled by the county commissioners choosing from a list of candidates submitted by the political party (Mont. Code Ann. § 5-2-403).
8. Names of parties are protected from unauthorized use (Mont. Code Ann. § 13-10-602).

Nebraska

1. Pays expenses of primaries (Neb. Rev. Stat. §§ 32-106, 32-226, 32-417).
2. Parties receive free lists of registered voters (Neb. Rev. Stat. § 32-224.01).
3. Sample ballot is printed in a newspaper of general circulation (Neb. Rev. Stat. § 32-433).
4. Voter registration allows for party enrollment (Neb. Rev. Stat. § 32-223).
5. Election judges and clerks chosen by parties (Neb. Rev. Stat. §§ 32-403, 32-404).
6. Parties may appoint watchers to be present at each polling place (Neb. Rev. Stat. § 32-493).

Nevada

1. Pays for primaries (Nev. Rev. Stat. Ann. § 293.443).
2. Political parties receive free lists of registered voters (Nev. Rev. Stat. Ann. § 293.440).
3. Mails sample primary election ballots to all registered voters (Nev. Rev. Stat. Ann. § 293.565).

4. The county clerk must publish a notice of primary elections in a newspaper of general circulation (Nev. Rev. Stat. Ann. § 293.203).

5. Political parties recommend election board officers (Nev. Rev. Stat. Ann. § 293.219).

6. Representatives of political parties may examine condition of voting machines (Nev. Rev. Stat. Ann. § 293B.245).

New Hampshire

1. Pays some primary election costs (N.H. Rev. Stat. Ann. §§ 656:1, 656:43).

2. Voter registration allows for party enrollment (N.H. Rev. Stat. Ann. § 654:7).

3. Party political committees appoint election inspectors (N.H. Rev. Stat. Ann. § 658:2).

New Jersey

1. Pays for primary election costs (N.J. Stat. Ann. § 19:45-1).

2. A state income tax "check-off" provision allows taxpayers to have one dollar (two for a joint filing) paid to the campaign fund, part of which pays for primary campaigns (N.J. Stat. Ann. §§ 19:44A-30, 54A:9-25.1).

3. Sample ballots are mailed to registered voters prior to the day of the primary (N.J. Stat. Ann. § 19:23-33).

4. Representatives of political parties may examine condition of voting machines prior to general use (N.J. Stat. Ann. § 19:48-6).

5. Notice of the primary published in newspaper of general circulation (N.J. Stat. Ann. § 19:12-7).

New Mexico

1. Pays for some primary expenses (N.M. Stat. Ann. §§ 1-10-2, 1-10-4, 1-9-7, 1-9-9).

2. Lists of registered voters supplied to county party chairman free of charge (N.M. Stat. Ann. § 1-5-14).

3. Sample ballots are made available to all "interested persons for distribution to voters" (N.M. Stat. Ann. § 1-10-10).

4. Voter registration form provides for party affiliation (N.M. Stat. Ann. § 1-5-19).

5. Election precinct boards chosen from lists submitted by political parties (N.M. Stat. Ann. § 1-2-8).

6. Board of registrars appointed from political parties (N.M. Stat. Ann. §§ 1-4-33, 1-4-34).

7. County chairmen are present at testing of voting machines (N.M. Stat. Ann. § 1-11-6.1).

New York

1. Pays for primaries (N.Y. Elec. Law § 4-136 (McKinney)).

2. Lists of registered voters are provided free of charge to county chairmen of political parties. (N.Y. Elec. Law § 5-602 (McKinney)).

3. Board of electors mails sample ballots to all registered voters or else publishes a copy in newspapers "representing the major political parties" (N.Y. Elec. Law § 7-118 (McKinney)).

4. Voter registration provides for party enrollment (N.Y. Elec. Law § 5-210 (McKinney)).

5. Political parties may appoint poll watchers (N.Y. Elec. Law § 5-206 (McKinney)).

6. Representatives of political parties may be present at the installation of voting machines (N.Y. Elec. Law § 7-206 (McKinney)).

North Carolina

1. Pays for primaries (N.C. Gen. Stat. §§ 163-104, 163-109).

2. An "add-off" provision allows taxpayers to earmark one dollar to a fund for the use of eligible political parties on a *pro rata* basis (N.C. Gen. Stat. § 105-159.1).

3. Lists of registered voters are available to political parties (N.C. Gen. Stat. § 163-66).

4. The State Board of Elections distributes sample ballots to precinct registrars (N.C. Gen. Stat. § 163-141).

5. State chairmen of political parties provide lists from which members of the county and state board of elections are chosen (N.C. Gen. Stat. §§ 163-30, 163-19).

6. Chairmen of political parties provide lists from which precinct registrars and judges of elections are chosen (N.C. Gen. Stat. § 163-41).

7. Party chairmen designate observers for each polling place (N.C. Gen. Stat. § 163-45).

8. In the event of a vacancy in the General Assembly, the governor appoints for the remainder of the term the person recommended by the outgoing officeholder's political party executive committee (N.C. Gen. Stat. § 163-11).

North Dakota

1. Pays expenses of primary elections (N.D. Cent. Code §§ 16.1-06-01, 16.1-05-05).

2. Election judges are the precinct committeemen of the two major political parties, or their designees (N.D. Cent. Code § 16.1-05-01)

Ohio

1. Pays expenses of primary elections (Ohio Rev. Code Ann. § 3501.17).

2. "Check-off" provision allows taxpayers to designate one dollar (two for joint filing) of their tax check to a fund which is divided among political parties (Ohio Rev. Code Ann. §§ 3517.16, 3517.18, 5747.081).

3. The voter registration form records the voter's participation in primary elections and the party whose ballot the elector voted (Ohio Rev. Code Ann. § 3503.14).

4. Vacancies in the state legislature are filled by a vote of legislators from the same political party as the former officeholder (Ohio Const. Art. II, § 11).

Oklahoma

1. Pays for primary elections (Okla. Stat. tit. 26 §§ 6-103 to 6-104, 3-102 to 3-111).

2. Contributions to political parties are allowed as deductions in computing state income tax (Okla. Stat. tit. 74 § 4218).

3. Sample ballots are distributed to the precincts (Okla. Stat. tit. 26 § 6-117).

4. Voter registration provides for party enrollment (Okla. Stat. tit. 26 § 4-112).

Oregon

1. Pays for primary party elections (Or. Rev. Stat. §§ 255.305, 246.330, 246.250).

2. Contributions to political parties are deductible from income tax liability (Or. Rev. Stat. § 316.102).

3. An "add-on" provision allows state income taxpayers to contribute part of tax refund to a designated political party (Or. Rev. Stat. § 316.487).

4. The county clerk provides lists of registered voters to the political parties free of charge (Or. Rev. Stat. §§ 247.940, 247.945).

5. Sample ballots are published in general circulation newspapers prior to the primary (Or. Rev. Stat. § 254.205).

6. Voter registration provides for party enrollment (Or. Rev. Stat. § 247.121).

7. Vacancies in the state legislature are filled by the counties choosing from a list submitted by the former officeholder's political party (Or. Rev. Stat. § 171.060).

8. Names of political parties are protected from unauthorized use (Or. Rev. Stat. § 248.010).

9. Representatives of political parties are allowed to be present at the preparation and testing of voting machines (Or. Rev. Stat. § 254.235).

Pennsylvania

1. Pays for primary elections (Pa. Stat. Ann. tit. 25, § 2645 (Purdon)).

2. Voter registration provides for party enrollment (Pa. Stat. Ann. tit. 25, § 291 (Purdon)).

3. Political parties are entitled to appoint poll watchers (Pa. Stat. Ann. tit. 25, § 2687 (Purdon)).

4. Elector can vote a straight party ticket (Pa. Cons. Stat. Ann. tit. 25 § 2963 (Purdon)).

Rhode Island

1. Pays for primary election expenses (R.I. Gen. Laws §§ 17-6-2, 17-6-4).

2. A "check-off" provision allows for five dollars (ten if joint filing) of a taxpayer's tax liability to go to an account for election financing. The first two dollars go to the political party designated by the taxpayer (R.I. Gen. Laws § 44-30-2(d)).

3. Lists of registered voters are available only to political parties and candidates (R.I. Gen. Laws § 17-6-5).

4. Voter registration includes party affiliation (R.I. Gen. Laws § 17-9-26).

5. Elector can vote a straight party ticket (R.I. Gen. Laws § 17-19-15).

6. Names of Republican and Democratic parties are protected from unauthorized use (R.I. Gen. Laws § 17-23-7).

South Carolina

1. Provides lists of registered voters to the county committee of each political party (S.C. Code Ann. § 7-5-420).

2. Elector can vote a straight party ticket (S.C. Code Ann. § 7-13-330).

South Dakota

1. Pays for primary elections (S.D. Codified Laws Ann. § 12-1-11).

2. Lists of registered voters are available to party chairs and central committees (S.D. Codified Laws Ann. § 12-4-24.1).

3. Sample ballots are mailed to registered voters or else published in newspapers of general circulation (S.D. Codified Laws Ann. §§ 12-16-15, 12-16-16).

4. A majority of the state board of election is appointed by the Democratic and Republican leadership in the legislature (S.D. Codified Laws Ann. § 12-1-5).

Tennessee

1. Pays for primary elections (Tenn. Code Ann. §§ 2-12-109; 2-13-206).

2. County election commission must either mail sample ballots to all registered voters or publish a sample ballot in a general circulation newspaper (Tenn. Code Ann. § 2-5-211).

3. The state election commission is comprised of five members: three from the majority political party and two from the minority political party (Tenn. Code Ann. § 2-11-103).

4. Political parties may appoint poll watchers to monitor polling places (Tenn. Code Ann. § 2-7-104).

Texas

1. Allows for state funds to reimburse expenses of political parties (Tex. Elec. Code Ann. §§ 173.001, 173.081-173.083).
2. Copies of lists of registered voters are furnished to party's county chairs (Tex. Elec. Code Ann. § 18.007).
3. Party county chairmen appoint primary election judges (Tex. Elec. Code Ann. § 32.006).
4. Party county chairmen appoint poll watchers (Tex. Elec. Code Ann. § 33.003).

Utah

1. Pays for primary elections (Utah Code Ann. § 20-3-16).
2. "Check-off" provision allows taxpayers to designate one dollar of their tax check to be given to the political party of their choice (Utah Code Ann. §§ 59-10-547, 59-10-548).
3. The sample ballot is published in a newspaper of general circulation (Utah Code Ann. § 20-7-2).
4. Vacancies in both houses of the state legislature are filled by the governor who appoints a replacement from a list submitted by the central committee of the party of the former officeholder (Utah Code Ann. § 20-1-5).

Vermont

1. Runs primary elections through the offices of the secretary of state and county and town clerks (Vt. Stat. Ann. tit. 17 §§ 2351, 2357, 2359, 2360, 2362, 2363).
2. Town clerk makes lists of registered voters available to party chairmen (Vt. Stat. Ann. tit. 17 § 2141).
3. For all state, national, and county offices, the chairmen of the two major political parties sit on the board of elections (Vt. Stat. Ann. tit. 17 § 2592).

Virginia

1. Pays for primary elections (Va. Code Ann. §§ 24.1-181; 24.1-96).
2. "Add-on" provision of state income tax allows the taxpayer to contribute two dollars (four for joint filing) to a designated political party (Va. Code Ann. § 58-1-346).
3. The parties must be represented on the State Board of Elections, and the parties submit recommendations for the appointments (Va. Code Ann. § 24-1-18).
4. Representatives of political parties are entitled to be present at ballot count (Va. Code Ann. § 24-1-137).
5. Representatives of political parties are entitled to be present at preparation of voting machines (Va. Code Ann. § 24-1-210).

Washington

1. Pays for primary elections (Wash. Rev. Code Ann. §§ 29.04.020; 29.13.045; 29.13.047; 29.19.080).
2. Election inspectors and judges are selected from lists certified by the party's county chair (Wash. Rev. Code Ann. §§ 29.45.010, 29.45.030).
3. Vacancies in the state legislature are filled from lists submitted by the central committee of the political party of the former officeholder (Wash. Const. art. II, § 15).
4. Party candidates for president and vice president are entitled to one page in the candidates' pamphlet free of charge (Wash. Rev. Code Ann. § 29.80.050).

West Virginia

1. Pays for the primary election (W. Va. Code §§ 3-1-21, 3-1-44, 3-5-10).
2. Voter registration allows for party enrollment and precludes the voter from voting in a primary unless she designates a party (W. Va. Code § 3-2-18).

3. Registrars are chosen from lists drawn up by party county executive committees (W. Va. Code § 3-2-11).

4. Elector can vote a straight party ticket (W. Va. Code § 3-6-2).

5. Sudden vacancies in state legislature are filled by the governor who chooses from a list of three names submitted by the political party of the former officeholder (W. Va. Code § 3-10-5).

6. Representatives of political parties may be present at the examination of voting machines (W. Va. Code § 3-4-12).

Wisconsin

1. Pays for all elections (Wis. Stat. Ann. § 5.68).

2. "Check-off" provision allows taxpayers to earmark one dollar of state taxes to the Wisconsin Election Campaign Fund which is used in part for primaries (Wis. Stat. Ann. § 11.50).

3. Elector can vote a straight party ticket (Wis. Stat. Ann. § 5.64).

Wyoming

1. Pays for primary elections (Wyo. Stat. §§ 22-23-101, 22-5-210).

2. Lists of registered voters are sent to chairmen of political parties (Wyo. Stat. § 22-3-109).

3. Sample ballots are published in general circulation newspapers (Wyo. Stat. § 22-6-105).

4. Voter registration provides for party affiliation (Wyo. Stat. § 22-3-103).

5. Judges of elections and count boards chosen from lists submitted by party county chairmen (Wyo. Stat. § 22-8-101).

6. Sudden vacancies in state legislature are filled by the Governor who chooses from a list submitted by the political party of the former officeholder (Wyo. Stat. § 22-18-111).

7. Representatives of political parties may be present at the preparation of voting machines (Wyo,. Stat. § 22-10-108).

DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, et al.,
Petitioners,

VS.

BOB GEARY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CITY OF SAN DIEGO AS AMICUS CURIAE ON BEHALF OF PETITIONERS

JOHN W. WITT, City Attorney
C. M. FITZPATRICK, Assistant City Attorney
MARGUERITE S. STRAND, Deputy City Attorney
Office of City Attorney
Litigation Division
525 "B" Street, Suite 2100
San Diego, CA 92101
Telephone: (619) 533-4700
Counsel for
The City of San Diego

Bowne West, Inc., Law Printers. (213) 627-2200

12

INDEX

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
Introduction	2
A. The Purpose Of Article II, Section 6(b) Of The California Constitution Was To Affirm California's Policy That Political Parties Have No Role In Nonpartisan Elections	2
B. Maintaining The Nonpartisan Nature Of Local Government Remains A District Priority In Communities Throughout California	5
CONCLUSION	8

TABLE OF CASES

	Page
Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990)	4
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989)	4
Geary v. Renne, 880 F.2d 1062, (9th Cir., 1989); reh'g granted en banc, 895 F.2d 1230 (9th Cir., 1990)	3, 7
Geary v. Renne, 911 F.2d 280 (9th Cir., 1990)	3
Libertarian Party v. Eu, 28 Cal.3d 535, 546 (1980)	4

TABLE OF STATUTES

United States Constitution	
First Amendment	
Article IV, Section 4 (Guarantee Clause)	2
California Constitution	
Article II, Section 6(a)	3
Article II, Section 6(b)	passim
California Elections Code	
Section 6430	4
Sections 8000-9956	4
San Diego, California, City Charter	
Section 10	5
Section 12	5
Section 23	5
San Diego, California	
1988, Proposition E	5, 6

OTHER AUTHORITIES

	Page
Los Angeles Times	
October 25, 1989, A3	6
Note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 Columbia Law Review 1677 (1987)	6

No. 90-769

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, et al.,
Petitioners,

VS.

BOB GEARY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CITY OF SAN DIEGO AS AMICUS CURIAE ON BEHALF OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The interest of Amicus Curiae is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether the California constitutional provision, Article II, Section 6(b) which prohibits political parties from endorsing, supporting, or opposing candidates for nonpartisan local office violates the First Amendment.

ARGUMENT

INTRODUCTION

In this case, an opportunity is afforded to resolve a conflict between competing rights guaranteed in Article IV, Section 4 of the United States Constitution (the Guarantee Clause) and the First Amendment.

The Guarantee Clause basically provides that each state shall have the right to structure its own form of self-government.

The constitutional conflict occurs when groups assert the right to engage in First Amendment activity, in the form of political endorsement, support or opposition of candidates, in the context of nonpartisan local elections.

The court below held that Article II, Section 6(b) of the California Constitution was violative of First Amendment rights in that it did not represent a compelling interest and was not narrowly tailored to achieve its purported objectives. The court, unfortunately, failed to correctly target the compelling interest served, that is the assurance of the nonpartisan character of local, judicial, and school offices.

A. The Purpose Of Article II, Section 6(b) Of The California Constitution Was To Affirm California's Policy That Political Parties Have No Role In Nonpartisan Elections.

Based upon its experience with political corruption in the early twentieth century, California has endeavored to structure its own form of self-government by maintaining a strong local government system which is free from political party influence.

In 1986, California voters reaffirmed their commitment to the nonpartisan nature of local and judicial offices by

expressly prohibiting political parties from endorsing, supporting, or opposing candidates for nonpartisan offices. The California Constitution was amended to read as follows:

> Article II, Section 6
>
> (a) all judicial, school, county and city offices shall be nonpartisan;
>
> (b) no political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

Article II, Section 6(b) has been characterized as "a law preventing disruption of the nonpartisan political sector from without in order to permit the selection of candidates in that sector to take place in accordance with nonpartisan principles." *Geary v. Renne,* 880 F.2d 1062, 1082 (9th Cir. 1989), reh'g granted en banc, 895 F.2d 1230 (9th Cir. 1990). Section 6(b) clearly demonstrates California voters' concern regarding the adverse effects of partisan politics on the quality and operation of local and judicial offices.

Though the court below believed that "[v]oters are free to accept or reject endorsements made on the basis of political beliefs," realistically, party endorsed candidates become the beneficiaries of party funds, and hence, the media attention and visibility political party money provides. *Geary v. Renne,* 911 F.2d 280, 287 (9th Cir. 1990) (Reinhardt, J., concurring). It is precisely this emphasis on party endorsement that California voters sought to avoid by means of amending the state constitution in 1986.

By approving the constitutional amendment in question, voters did not advocate the curtailment of political party activity in the partisan office arena. This issue was

fully addressed in *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989). In *Eu,* this Court held as violative of the First Amendment a California statute which regulated the traditional activities of political parties in partisan office primary elections. But that issue is separate and distinct from the voters' compelling concern regarding the potential impact of party endorsements on post-election performance of nonpartisan office holders.

Political parties and their numerous partisan activities such as conducting campaigns, nominating partisan office candidates who will espouse party held positions, and even structuring the party organization are statutorily regulated by California Elections Code sections 8000-9956. Regarding primary elections, a political party is qualified to participate if, (a) during the last preceding gubernatorial election one of its candidates received two percent (2%) of the entire vote of the state; (b) voters equal to at least one percent (1%) of the entire vote of the state declared their intention to affiliate with the party; or (c) a petition signed by ten percent (10%) of the voters declaring that they represent a named proposed party is filed with the Secretary of State. Cal. Elec. Code § 6430 (Deering Supp. 1990). These sections regulate traditional political party participation in primary elections by requiring a preliminary showing of a modicum level of support. The state's interest is to avoid confusion, deception and even frustration of the democratic process at the general election. *Libertarian Party v. Eu,* 28 Cal.3d 535, 546 (1980).

In *Austin v. Michigan Chamber of Commerce,* 110 S.Ct. 1391, (1990), this Court found valid a Michigan state law prohibiting corporations, which are statutorily regulated but enjoy special advantages as do political parties in

California, from using corporate treasury funds for independent expenditures in support of or opposition to any candidate in elections for state office. The Court held that "the state's decision to regulate only corporations was precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of legal advantages given to corporations." *Id.* at 1401. Similarly, political parties should not be allowed to manipulate the political process in the nonpartisan forum, and *only* in the nonpartisan forum, with their own "war chests." California voters, by Article II, Section 6(b), have not closed the marketplace of ideas and discussion that is part and parcel of the election process; rather, they sought to maintain the independence of the marketplace, freeing it from political overtones that have little, if anything, to do with local government services.

B. Maintaining The Nonpartisan Nature Of Local Government Remains A Distinct Priority In Communities Throughout California.

The City of San Diego, a charter city under the California Constitution, has been governed by its present charter since 1931. Like many California communities, San Diego has a long-standing tradition of nonpartisan local government. Even before Section 6(b) was added to Article II, the principle and practice of nonpartisanship thrived in San Diego.

From 1931 through November 1988, San Diego, whose city charter provides for a nine member City Council, including the mayor,[1] had a system of council nomination by district and election citywide. With the passage of Proposition E, amending Sections 10, 12, and 23 of The

---

[1]San Diego City Charter sections 10, 12 (1931).

San Diego City Charter, that system changed to provide for direct district nomination and election. Proposition E was the result of community concern that council members be even more responsive and attuned to constituent needs. In a 1989 newspaper survey of 701 San Diegans, sixty-one percent (61%) of the registered voters polled stated they favored district nomination *and* election of City Council members. The reaction to district nomination and election of Council members overall was almost as high at fifty-seven percent (57%).[2]

A recognition of the increasing role San Diego's varied neighborhoods play in local government, as well as a belief that relatively unknown candidates with limited financial backing should be given an opportunity to succeed to office through grass-roots campaigns were at the heart of the Charter amendment.

Clearly, San Diegans hold the view that local government is primarily concerned with the delivery of government services, and that "there is no Democratic or Republican way to pave a street." Note, *Local Nonpartisan Elections, Political Parties and the First Amendment,* 87 Colum. L. Rev. 1677, 1679 (1987) (citing R. Mountjoy, Historical Perspective of Nonpartisan Elections) (position paper by Cal. Assembly member/on file at the Columbia Law Review.)

While political parties may frequently view local nonpartisan office as a training ground for candidates being groomed for higher partisan office, the community's interest is in its own welfare. If political parties are allowed to play a more dominant role in the nomination and election of local officeholders, we contend that the garnering of party support in the form of funding and identification

[2]Los Angeles Times, October 25, 1989 at A3.

could overshadow what should be a local candidate's primary focus, the community's welfare.

In the initial Ninth Circuit opinion, the court recognized that, "[t]he dominant effect [of Section 6(b)] is to open the process to more diverse interests, groups, and individuals, or to prevent the political process from becoming clogged and unworkable . . . " *Geary v. Renne,* 880 F.2d at 1065.

San Diegans, in uniting to amend their City Charter, aimed to eliminate political parties as intermediaries between citizens and local government. In amending their City Charter, San Diegans have further enhanced this community's long-standing nonpartisan tradition by taking the political process to the people, affording them the opportunity to nominate and elect representatives from their respective council districts without partisan endorsement.

CONCLUSION

Once partisan endorsements are permitted, the nonpartisan tradition of local elections will disappear. San Diego, as well as other California communities whose commitment to the principle and practice of nonpartisanship is long-standing, will be unable to protect the offices of local government from undue political influence.

For the reasons set forth herein, the petition for writ of certiorari should be granted.

DATED: December 5, 1990

Respectfully submitted,

JOHN W. WITT
City Attorney
C. M. FITZPATRICK
Assistant City Attorney
MARGUERITE S. STRAND
Deputy City Attorney

By C. M. Fitzpatrick
Assistant City Attorney
and Counsel of Record
Attorneys for Amicus Curiae
Counsel for
City of San Diego

MOTION FILED
DEC 17 1990

No. 90-769

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Telephone: (415) 434-1600

Attorneys for Amicus Curiae

*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Table Of Authorities	iii
Motion For Leave To File Brief Amicus Curiae In Support Of Petitioners	vii
Interest Of Amicus Curiae	1
Argument	2
I. California Has A Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary.	2
II. Section 6(b) Serves The State's Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary By Preventing California's Judges From Being Perceived As Partisan.	4
III. Section 6(b) Is Narrowly Tailored To Serve The State's Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary.	12
A. The Ninth Circuit's Opinions Ignore Recently Enacted Limits On Contributions To Judicial Candidates In California As Well As The Substantial Differences Between Partisan Political Activity And Campaign Contributions.	13
B. Section 6(b) Is Not Underinclusive Because It Addresses Only Political Parties, And Not Other Interest Groups That Participate In Judicial Campaigns.	15

Page

C. There Are No Less Drastic Alternatives To Section 6(b) That Would Serve As Effectively The State's Interest In Promoting Public Confidence In The Impartiality And Nonpartisanship Of Its Judiciary. 17

Conclusion 18

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 3

Baker v. Carr, 369 U.S. 186 (1962) 11

Bridges v. California, 314 U.S. 252 (1941) 7

Buckley v. Valeo, 424 U.S. 1 (1976) 14

Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179 (1939) 6

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 8, 10, 11

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 9

Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) 9

Gregg v. Georgia, 428 U.S. 153 (1976) 7

In re Murchison, 349 U.S. 133 (1955) 3

Levine v. United States, 362 U.S. 610 (1960) 3

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 3, 15

Mistretta v. United States, 488 U.S. 361 (1989) 11, 15

Offutt v. United States, 348 U.S. 11 (1954) 3

	Page
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	7
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	3
Rose v. Mitchell, 443 U.S. 545 (1979)	3
Rutan v. Republican Party of Illinois, – U.S. –, 58 U.S.L.W. 4872 (1990)	10
Service Employees International Union v. Fair Political Practices Commission, 747 F. Supp. 580 (E.D. Cal. 1990), *application for stay of enforcement pending appeal denied sub nom. Kopp v. Service Employees International Union*, – U.S. –, 59 U.S.L.W. 3307 (Oct. 12, 1990)	14
Unger v. Superior Court, 37 Cal. 3d 612 (1984)	5, 18
Unger v. Superior Court, 102 Cal. App. 3d 681 (1980), *cert. denied*, 449 U.S. 1131 (1981)	17-18
White v. Davis, 13 Cal. 3d 757 (1975)	6
Wood v. Georgia, 370 U.S. 375 (1962)	7
Young v. U.S. ex rel. Vuitton et Fils, S.A., 481 U.S. 787 (1987)	3

Statutes and Regulations

	Page
California Constitution	
art. II, §6(a)	passim
art. II, §6(b)	passim
art. II, §2-3/4 (1926)	5
Cal. Code Civ. Proc. §170.6	15
Cal. Gov't Code	
82023	14
85102	13
85300	15
85301(a)	13
85303(a)	13
Cal. Stats. 1913, ch. 690, §5	5
5 U.S.C.	
§7324(a)(2)	9
§7326	9
28 U.S.C. §455(a)	3

Other Authorities

ABA Model Code of Judicial Conduct, §3E(1)	15
1 American Commonwealth 507 (3d ed. 1905)	8
California Ballot Pamphlet, June 3, 1986 Primary Election	5-6, 8
P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980)	7
Note, Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 STAN. L. REV. 449 (1988)	14

Page

Schotland, Elective Judges' Campaign Financing, 2 J. L. & POL. 57 (1985) 12

Special Commission on the Administration of Justice in Cook County, A Report on Judicial Selection (1985) 9

State of New York Commission on Government Integrity, Becoming a Judge: Report on the Failings of Judicial Elections in New York State (1988) 10

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*, *Petitioners,*

VS.

BOB GEARY, *et al.*, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, the California Judges Association ("CJA") seeks leave to file a brief amicus curiae in support of the petition for certiorari. Counsel for Petitioners has given consent. Counsel for all Respondents except Terence Faulkner and Sudi Trippet has similarly consented. Letters seeking consent have been sent to Mr. Faulkner and Ms. Trippet, who appeared *pro se* in this proceeding. Ms. Trippet has given consent, but the letter to Mr. Faulkner has not been returned.

The CJA has a direct interest in this case. Its members include virtually every active and retired judge from the California Supreme Court, the California Courts of Appeal, and the State's Superior, Municipal and Justice Courts. If this litigation results in the invalidation of Article II, Section 6(b) of the California Constitution, each member of CJA facing an election or retention campaign will obviously be affected. Moreover, the CJA and its

members are concerned that permitting political parties to endorse candidates, make contributions and otherwise participate in judicial elections will adversely affect the public's perception of California's judges as impartial and nonpartisan, a perception that CJA believes is essential for the California courts effectively and impartially to administer justice.

Although filed in support of the petition for certiorari, the attached brief amicus curiae analyzes this case in somewhat different terms. While the petition for certiorari does not distinguish between judicial and other nonpartisan elections, the brief amicus curiae which CJA seeks leave to file focuses on the special constitutional concerns applicable to campaigns for judicial office. In particular, the accompanying brief seeks to justify Section 6(b) as a means to further the State's compelling interest in promoting the appearance of justice, an interest mentioned only in passing in the petition for certiorari. The CJA thus believes that the accompanying brief may be helpful to the Court in determining whether certiorari should be granted and, accordingly, requests leave to file.

Dated: December 17, 1990

Respectfully submitted,

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Telephone: (415) 434-1600

Attorneys for Amicus Curiae
CALIFORNIA JUDGES
ASSOCIATION

**Counsel of Record*

BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae California Judges Association is the collective voice of the California state judiciary, the Nation's largest judicial system. It speaks for a membership comprising virtually every active and retired judge from the State's Supreme Court, Courts of Appeal, and Superior, Municipal and Justice Courts.

This case concerns the constitutionality of Article II, Section 6(b) of the California Constitution, which provides that "[n]o political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." Article II, Section 6(a) in turn makes "[a]ll judicial, school, county and city offices" nonpartisan.

Doubtless because these constitutional provisions affect campaigns for both judicial and non-judicial offices, neither the petition for certiorari nor the principal opinion below differentiates between judicial elections and elections for other nonpartisan positions. Indeed, even the two Ninth Circuit opinions that discuss whether invalidating Section 6(b) would threaten the independence of the judiciary seem more concerned with the pragmatic effects of the decision below than with whether analysis of Section 6(b)'s constitutionality might be different for judges than for other non-partisan officials.

Amicus believes that this difference is crucial for resolving the important First Amendment issue this case presents. Indeed, no analysis that treats judges fungibly with other local officials does justice to the interests at stake. For example, the Ninth Circuit discounted California's interest in maintaining "elected officials' independence from partisan political pressures" because it believed democracy is vindicated when "candidates and elected officials alter or reaffirm their own positions on issues in response to political messages . . . ." App. to Pet. A4-A5 (citation omitted). That may well be true for

local officials such as members of a county board of supervisors, school board, or city council. But for judges to "alter . . . their own positions on issues in response to political messages" is to violate their oaths of office.

Unlike municipal officials, or a members of a county board of supervisors or community college district, judges have the power permanently to deprive citizens of their life, liberty and property. Consequently, judges must both be fair—and appear to be so. As a result, the State has an interest in regulating judicial elections so as to preserve judicial independence that may be largely absent with respect to elections for less sensitive offices.

Amicus believes that Section 6(b) furthers the actuality and the appearance of justice by freeing California's judges from the stigma of partisanship. Indeed, Section 6(b) is a vital part of California's non-partisan judicial election system. That system has served California well. Although the California judiciary is larger than either the federal judiciary or that of any other State, the California courts have been notably free of corruption, scandal, or the misuse of judicial power for partisan ends. As the collective representative of the members of that judiciary, amicus believes that invalidation of Section 6(b) would threaten both the actuality and the appearance of justice, and therefore urges the Court to grant certiorari.

ARGUMENT

I.

CALIFORNIA HAS A COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

The petition for certiorari identifies two compelling interests served by Section 6(b): promoting impartial administration by local officials and judges and freeing those who hold nonpartisan positions from partisan pressure. Pet. 8-10. This brief focuses on a related, but distinct, interest: preserving the *appearance* of impartial justice.

This Court has often recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court has invoked this interest in a variety of contexts: to reverse state court judgments where the judge had a personal stake in the outcome (*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)); to hold under this Court's supervisory power that a party benefitting from a federal court order may not be appointed to prosecute a contempt action for a violation of that order (*Young v. U.S. ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987)); to grant the public and press a First Amendment right to attend criminal trials (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980)); and to hold that claims of discrimination in the selection of grand jury veniremen are cognizable on federal habeas corpus. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). Indeed, the notion that justice must both be fair and appear to be so is "deeply rooted in the common law," as well as in this Court's constitutional jurisprudence. *See Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The State's interest in preserving the appearance of justice is separate and distinct from, although obviously related to, the interest that justice in fact be done in any particular case. For this reason, the need to satisfy the appearance of justice "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136). Indeed, this Court has held that the need "to promote public confidence in the integrity of the judicial process" justifies the disqualification of judges under 28 U.S.C. §455(a), which requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," even if the judge has no knowledge of the facts creating an appearance of impropriety. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 859-60.

The distinction between the actuality of justice and its appearance has important ramifications for this case. The two Ninth Circuit opinions that specifically address Section 6(b)'s applicability to judicial elections differ as to whether invalidating that provision will threaten the *actuality* of justice by throttling judicial independence. *Compare* App. to Pet. A16-A20 (Reinhardt, J., & Kozinski, J., concurring) (Section 6(b)) "appears to be a particularly peculiar way of addressing the problem of maintaining judicial independence") *with id.* at A55-A66 (Alarcon, J. dissenting) (Section 6(b)) is the "only realistic safeguard of judicial independence"). In our view, however, the constitutionality of Section 6(b) should not turn on whether San Francisco has amassed sufficient proof that judges endorsed by political parties will in fact trim their decisions to the dictates of partisan politics. Instead, this Court should consider whether Section 6(b) serves the State's separate interest in preserving the appearance of justice.

As we shall now demonstrate, the California electorate believes that judges endorsed and supported by political parties cannot be truly independent. Moreover, this belief is solidly grounded in both historical experience and analysis of the prerequisites for an independent judiciary. Accordingly, Section 6(b) serves the State's compelling interest in promoting public confidence in the impartiality of its judges.

II.

SECTION 6(b) SERVES THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY BY PREVENTING CALIFORNIA'S JUDGES FROM BEING PERCEIVED AS PARTISAN.

California's nonpartisan judicial election system did not emerge from a vacuum. To the contrary, as the petition for certiorari and Judge Alarcon's dissent demonstrate, nonpartisanship was a direct response to pervasive partisan corruption of politics at the state and local level. Pet. 7-8; App. to Pet. A48-A50 (Alarcon, J.,

dissenting). Thus, in 1913, after numerous scandals led to the election of Governor Hiram Johnson on a platform of political reform, California enacted a statute barring political parties from nominating candidates for judicial office. Cal. Stats. 1913, ch. 690, §5. In 1926, the first reference to non-partisanship with respect to judicial elections was added to the California Constitution (Cal. Const., art. II, §2-3/4 (1926)), and in 1972 the California Constitution was amended explicitly to state that "[a]ll judicial, school, county, and city offices shall be non-partisan."

In 1984, the California Supreme Court held in *Unger v. Superior Court*, 37 Cal. 3d 612 (1984), that this language did not prohibit partisan endorsements in non-partisan races. At the very next general election the voters adopted Proposition 49, which added Article II, Section 6(b) to the California Constitution. As the petition for certiorari notes, the ballot argument in favor of Proposition 49 argued that an endorsement ban was necessary to prevent political party machines from controlling judges, school boards and local officials. Pet. 5; *see also* App. to Pet. A43 n.35 (Rymer, J., dissenting). However, the proponents of the measure placed equal importance on the need to preserve the *appearance* of justice, particularly with respect to judicial elections. Thus, the ballot argument in support of Proposition 49 stated:

> "WHEN PARTY BOSSES HAVE HAD A STRANGLEHOLD ON LOCAL POLITICS ELSEWHERE, HOWEVER, CORRUPTION IN CITY HALL AND IN THE COURTS OFTEN HAS BEEN THE RULE . . . NOT THE EXCEPTION.
>
> "To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> "WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN—NOT BECAUSE THEY ARE

IMPARTIAL—BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?" (California Ballot Pamphlet, June 3, 1986 Primary Election, at 26)

The opponents of Section 6(b) did not quarrel with the need to promote judicial independence, or to remove judges from the partisan arena. Instead, they contended, in the rebuttal to the argument quoted above, that Proposition 49 was overbroad, because it dealt with city, county and school board officers, as well as judges:

> "Proposition 49 is far too broad just to deal with partisan involvement in judicial elections. It prohibits party recommendations in all city and county elections. There should be a much narrower ballot measure for judicial elections." (*Id.* (emphasis added))

In adopting Proposition 49 by a substantial (56%-44%) margin, California voters accepted the contention that permitting partisan involvement in judicial elections would threaten the impartiality of the judiciary.[1] That belief in and of itself provides a constitutionally sufficient reason to hold that Section 6(b) serves a compelling interest. If the California electorate believes—as the passage of Proposition 49 indicates—that partisan involvement in judicial elections threatens the impartiality of the State's judges, permitting such involvement will inevitably lessen public respect for the courts and thus threaten the appearance of justice.[2]

---

[1]Although this Court does not seem to have addressed the issue, "California decisions have long recognized the propriety of resorting to . . . election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." *White v. Davis*, 13 Cal. 3d 757, 775, n.11 (1975); *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal. 2d 179, 185 (1939).

[2]Because justice must both be fair and appear to be so, this argument (continued...)

We use the term "partisan involvement" advisedly. Although the Ninth Circuit's majority opinion states at one point that Section 6(b) "imposes a total ban on any gesture of support for or opposition to a candidate" (App. to Pet. A8), both that opinion and the concurrence repeatedly describe Section 6(b) as a "ban on partisan endorsements" and analyze its constitutionality accordingly. *See*, *e.g.*, App. to Pet. A10 ("the ban on partisan endorsements by political parties burdens political speech without being narrowly tailored to serve competing state interests"); *id.* at A21 ("the prohibition of endorsements appears to be counter-productive"). In fact, however, Section 6(b) is *not* limited to endorsements; instead, it provides that no political party or central committee shall "endorse, *support, or oppose* a candidate for non-partisan office." (Emphasis added). The ballot argument in favor of Proposition 49 reveals that

---

[2](...continued)
does not turn on whether increasing partisanship in the judicial selection process will in fact lead to more partisan judicial decision-making. However, academic literature not cited by the Ninth Circuit indicates that this will occur. Thus, one leading scholar of judicial elections—(whose work was cited by the concurrence (*see* App. to Pet. A20 n.9)—has written:

> "[P]artisanship of the judicial selection system . . . has an impact upon judicial behavior. A partisan judicial selection system is more likely than a nonpartisan system both to [a] encourage the recruitment of party activists deeply committed to the policy and value orientations of their party and [b] provide judges with a partisan constituency whose policy preferences the judges must anticipate in their judicial decision-making if they are to realize renomination and re-election." (P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 162 (1980))

Even in the absence of definitive evidence on this issue, the California electorate was free to act on the basis of beliefs that are not "clearly wrong." *Gregg v. Georgia*, 428 U.S. 153, 184-87 (1976) (plurality opinion) (inconclusive debate as to whether capital punishment is a deterrent does not prevent legislature from determining that capital punishment is necessary in some cases); *accord Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (legislature may assume without scientific data that exposure to obscene material adversely effects individuals and society). Indeed, this Court has recognized that a legislative determination that a particular category of speech threatens the administration of justice "would weigh heavily in any challenge of the law as infringing constitutional limitations." *Bridges v. California*, 314 U.S. 252, 260 (1941); *accord Wood v. Georgia*, 370 U.S. 375, 385-86 (1962).

Section 6(b) was intended to prevent political parties from providing "money, help, and endorsements" in non-partisan races. California Ballot Pamphlet, June 3, 1986 Primary Election, at 26.[3] Thus, the issue before this Court is not whether California's voters were legitimately concerned that judicial independence might be compromised by partisan endorsements alone, but rather whether they reasonably perceived that partisan endorsements, organizational support, *and* monetary contributions would threaten public confidence in the impartiality of California's courts.[4]

The California electorate's belief that partisan involvement in judicial elections threatens judicial independence is eminently reasonable, and is based on both long-established tradition and historical fact. Immediately prior to the Progressive era, Lord Bryce argued that popular elections for judges "lower[ed] the character of the judiciary," due to the influence of political parties. 1 *American Commonwealth* 507 (3d ed. 1905).[5] Congress, too, has recognized that partisan political activities pose a particular threat to the impartial administration of the law; thus, the Hatch Act bars federal employees from engaging in partisan—but *not* non-partisan—political activities. *Compare* 5 U.S.C. §7324(a)(2) *with* 5 U.S.C. §7326; *see also*

---

[3]Thus, the ballot argument told the electorate that local office holders were "concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines." *Id.*

[4]Although this case arises from the refusal of San Francisco's Registrar of Voters to permit official party endorsements to be printed in the Voter's Pamphlet (*see* App. to Pet. A2), the District Court's judgment restrains enforcement of Section 6(b) in toto, rather than simply as applied to endorsements (App. to Pet. A118), and that judgment was affirmed by the Ninth Circuit. App. to Pet. A10. Because this Court reviews judgments, not opinions (*Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), it is of no moment that the Ninth Circuit's opinion focuses almost exclusively on Section 6(b)'s effect on endorsements.

[5]"Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance." (*Id.*)

Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 576 (1973).

Experience in other states has confirmed California's wisdom in seeking to keep political parties out of the judicial election process.[6] For example, following the "Greylord" scandal in Chicago, Illinois, the chief judge of the Circuit Court of Cook County created a Special Commission on the Administration of Justice in Cook County. The Commission's report includes a telling description of the evils of partisan judicial elections:

> "Where a position on the bench has been secured with the political, organizational, or financial assistance of party leaders, the judge 'enters upon his office under a load of political debt, and however high-minded he may be, he will find it almost impossible to resist completely the importunities of his creditors for payment through judicial favors—sometimes slight, sometimes not so slight.'" Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection*, 4 (1985))[7]

Cook County's experience is typical. In 1988, a report of the New York State Commission on Government Integrity reached similar conclusions after a study of judicial elections in that State. In concluding that "the conflict between party politics . . . and judicial independence and non-partisanship . . . is inherent in the partisan nature of party activity and political elections," the Commission stated:

---

[6]The concurrence criticizes San Francisco for failing to proffer evidence concerning the effects of partisan endorsements in California. App. to Pet. A-15 n.5. But California did not have to look only to its own experience in deciding to adopt Section 6(b). *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51 (1986) (city could rely on experience of other cities in adopting adult theater zoning ordinance).

[7]A copy of this Report will be lodged with the Clerk concurrently with the filing of this brief.

"While party control may be appropriate in the case of election to offices within the legislative or executive branches, in the case of judicial elections, such control undermines the moral foundation of the judiciary by threatening its independence and non-partisanship." (State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 4 (1988))

* * * *

"As our investigation shows, political parties are geared to reward loyalty, not merit; to discourage, not encourage independence and diversity; and to obtain power rather than promote justice. Such goals, however valuable to the operation of the party system in general, have no place in the selection of our judges." (*Id.* at 44-45)[8]

The belief of California's voters that partisanship and judicial independence are mutually incompatible is supported by logic, as well as experience. As Justice Scalia recently stated, "partisanship [in a judge] is not only unneeded but positively undesirable." *Rutan v. Republican Party of Illinois*, – U.S. –, 58 U.S.L.W. 4872 (1990) (Scalia, J., with Rehnquist, C.J., & Kennedy, J., dissenting). That is so for two separate, but related, reasons. First, judges may not be partisans because they must decide cases on their merits, and not on the basis of extraneous considerations based on political benefit or personal policy preferences. *See Chevron v. Natural Resources Defense Council*, 467 U.S. at 866. Second, because members of the "political" branches of government—unlike judges—*can* make decisions based on partisan considerations (*id.*),

[8]A copy of this Report will be lodged with the Clerk concurrently with the filing of this brief.

judicial partisanship lessens the distinction between the Judiciary and the Legislative and Executive branches of Government, and thus impairs the Judiciary's legitimacy. *Cf. Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (Because this Court possesses "neither the purse nor the sword," its authority "ultimately rests on sustained public confidence in its moral sanction," confidence that "must be nourished by . . . complete detachment, in fact and in appearance, from political entanglements . . . ."). For this reason, as the Court recently stated, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality *and* nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

California's voters thus had good reason to believe that the legitimacy of the State's judiciary—and its "reputation for impartiality and nonpartisanship"—would be weakened by permitting partisan "money, help, and endorsements" in judicial elections. Even in the unlikely event that no judge ever takes account of "political debt" in deciding a case, partisanship inevitably compromises the appearance of justice because it impairs the independence of the judiciary from the "political" branches. Freedom from partisanship—from "political entanglements"—is what separates the Judicial Branch from the rest of government. Once California's judges are labelled as partisan, nonpartisan judicial races will be distinguishable in name only from elections for Governor and members of the Legislature. But because judicial independence is founded upon nonpartisanship, judges identified in the consciousness of the electorate as "Democratic" or "Republican" will inevitably appear less independent of the "political" branches, less "legitimate," and less fair.[9]

[9]One need not be a Cassandra to believe that permitting partisan support in judicial elections will inevitably lead to judges and courts being tarred with partisan labels. In 1982, for example, one television commercial in Ohio told the voters that the "Democratic Supreme Court" had saved the electorate $30 million in just one year "by saying no to utility rate hikes," and urged voters to "keep the people's court

(continued...)

Section 6(b) thus serves California's compelling interest in promoting public confidence in the impartiality and nonpartisanship of its judiciary. We turn now to examine whether the provision is "narrowly tailored" to serve that interest.

III.

SECTION 6(b) IS NARROWLY TAILORED TO SERVE THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

In holding that Section 6(b) is not "narrowly tailored" to serve the interests identified by San Francisco, the Ninth Circuit's majority opinion and the concurrence criticized the provision on several grounds. First, the concurrence found that Section 6(b) did not serve the State's interest in "maintaining judicial independence" because "the dependence of judges on campaign contributions represents a far greater threat to the integrity of California's judiciary than the possibility that some judicial candidates may be endorsed by political party organizations." App. to Pet. A20. Second, the concurrence held that California may not constitutionally distinguish between political parties and other entities wishing to support or oppose candidates for judicial election. App. to Pet. A22. Third, the majority opinion upheld the District Court's finding that the "State could adequately safeguard the interests §6(b) was designed to protect by less drastic means, including provision for non-partisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates." App. to Pet. A8. As we shall now show, the first of these criticisms ignores recent changes in California law, as well as the critical differences between campaign contributions and

---

[9](...continued)
Democratic." Schotland, *Elective Judges' Campaign Financing*, 2 J. L. & POL. 57, 66 (1985). Obviously, Republicans and others championing causes favored by the G.O.P. may have reason to doubt whether a court elected as a "Democratic Supreme Court" will treat them impartially.

partisan endorsements, while the latter two fail to account for the State's interest in promoting public confidence in an impartial and nonpartisan judiciary.

A. The Ninth Circuit's Opinions Ignore Recently Enacted Limits On Contributions To Judicial Candidates In California As Well As The Substantial Differences Between Partisan Political Activity And Campaign Contributions.

The concurrence errs in assuming that the California electorate is insensible to the threat posed to judicial independence "from massive political contributions." App. to Pet. A11. While the opinion focuses almost exclusively on the California Supreme Court judicial retention election of 1986 (App. to Pet. A18-A20), California law has changed significantly since that episode. In 1988, California's voters adopted Proposition 73, which imposes strict contribution limits. "Persons" are subject to an annual contribution limit per candidate of $1,000. Cal. Gov't Code §85301(a).[10] Political committee contributions are subject to a per candidate annual limit of $2,500. Cal. Gov't Code §85303(a).[11] A "broad-based political committee" is limited to annual contributions of up to $5,000 per candidate.[12] These limits apply to candidates for "elective office" (Cal. Gov't Code §§85301(a), 85303(a)), which includes judicial offices. Cal. Gov't Code §82023.[13] Thus,

---

[10]A "person" is defined to mean "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization." Cal. Gov't Code §85102(b).

[11]A "political committee" is defined as "a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates." Cal. Gov't Code §85102(c).

[12]A "broad-based political committee" is defined to mean "a committee of persons which has been in existence for more than six months, receives contributions from 100 or more persons, and acting in concert makes contributions to five or more candidates." Cal. Gov't Code §85102(d).

[13]A federal district court has recently restrained enforcement of (continued...)

even assuming *arguendo* that interest group contributions pose a greater threat to judicial independence than does partisan political activity, the concurrence is wrong to suggest that the California electorate has "address[ed] only the superficial evil [of partisan involvement in nonpartisan campaigns] and fail[ed] to consider the underlying problem [of campaign contributions]." App. to Pet. A12.[14]

Moreover, the concurrence fails to acknowledge that campaign contributions pose a qualitatively different and less severe threat to the appearance of justice than partisan electioneering. Not every campaign contribution threatens judicial impartiality, and the large contributions that do pose a problem can be eliminated, as California has sought to do.[15] Nor, of course, will every case—or even many cases—heard by a particular judge involve campaign contributors. And in the rare case where a contribution might reasonably cause an objective observer to question the impartiality of the judge, judicial recusal is an available—and, in some cases, perhaps a required—

---

[13](...continued)
Proposition 73's contribution limits, on the ground that imposing limits on an annual (fiscal year) basis is unfair to challengers. *Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 588-90 (E.D. Cal. 1990), *application for stay of enforcement pending appeal denied sub nom. Kopp v. Service Employees International Union*, – U.S. –, 59 U.S.L.W. 3307 (Oct. 12, 1990). However, that decision may be reversed on appeal. Moreover, since contribution limits *per se* are unquestionably constitutional (*Buckley v. Valeo*, 424 U.S. 1 (1976)), there is no reason to believe that California's voters would not replace the contribution limits found in Proposition 73 with constitutional ones, if necessary.

[14]The concurrence also errs in comparing campaign contributions to partisan endorsements. *See, e.g.*, App. to Pet. A20. As discussed above, Section 6(b) proscribes not only partisan endorsements, but contributions and other forms of tangible aid, as well.

[15]Cf. Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 489 (1988) (arguing that a rule limiting attorney contributions under penalty of recusal by the judge "will reduce these contributions to a fairly uniform size, so that no single contributor will stand apart from the rest as having been *the* major cause of the judge's accession to the bench. As a result, there is no individual to whom the judge owes a debt of gratitude sufficient to cause an objective appearance of bias") (emphasis in original).

remedy.[16] For these reasons, the ethical problems posed by campaign contributions in judicial elections are episodic, rather than systemic, and thus do not pose a clear and present danger to the public's confidence in judicial independence and nonpartisanship. Cf. *Mistretta v. United States*, 488 U.S. at 407 (while "problem of individual bias is usually cured by recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judicial entanglement in the making of policy").[17]

B. Section 6(b) Is Not Underinclusive Because It Addresses Only Political Parties, And Not Other Interest Groups That Participate In Judicial Campaigns.

The concurrence's conclusion that California may not permissibly differentiate between political parties and other groups that participate in judicial elections ignores the State's appearance in promoting judicial independence and nonpartisanship. As long as contributions are limited,

---

[16]The ABA Code of Judicial Conduct, adopted in 1972, required judges to disqualify themselves in any proceeding where "their impartiality might reasonably be questioned . . . ." The new ABA Model Code of Judicial Conduct, adopted in 1990, contains identical language. §3E(1). Moreover, California law provides an additional safeguard against a judge deemed biased by an attorney or a litigant, since California permits either a litigant or a party to exercise one peremptory challenge in any case against any judge as of right, without any showing of cause other than the filing of a declaration stating that in the declarant's opinion, the judge is biased. Code Civ. Proc. §170.6.

[17]Indeed, the electorate's differing treatment of campaign contributions and partisan political activity in the context of judicial elections in and of itself demonstrates that the latter, but not the former, threatens the appearance of justice. While the electorate has attempted to ban partisan "money, help, and endorsements" by enacting Section 6(b), campaign contributions have been limited, rather than eliminated. The electorate has also adopted an election system which bans public financing (Cal. Gov't Code §85300), and thus requires candidates to seek private sources of funding for their campaigns. Plainly, the electorate does not agree with the concurrence that campaign contributions per se pose a greater threat to impartial and nonpartisan justice than partisan political activity. Because the State's interest in promoting the appearance of justice is based on the need to preserve public confidence in the impartiality of its courts (*see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 864-65), it is the electorate's opinion, rather than that of the concurrence, that should be dispositive.

and judges disqualify themselves in appropriate cases involving campaign contributors or opponents, political activity in judicial elections by special interest groups and newspapers (such as those mentioned in the concurring opinion at A22) do not threaten judicial independence. When contributions or endorsements come from political parties, however, a new and different factor enters the equation. As we have seen, the independence of the judiciary is not limited to the idea that judges must decide cases on their merits, free from extraneous "political" considerations. Instead, it is also based on maintaining the distinction between the Judiciary and the other, "political" branches of government. *See* pp.___, *supra*.

Partisan involvement in judicial elections thus threatens judicial independence in a way that non-partisan activity does not. Partisan activity in judicial elections links the judiciary to political partisans in the legislative and the executive branches. But no such linkage occurs as the result of involvement in judicial elections by other interest groups.[18]

Here, too, logic is confirmed by experience. As the petition for certiorari and Judge Alarcon's dissent below demonstrate, California's nonpartisan judicial election system came into existence as a response to entrenched partisan corruption. *See* pp.___, *supra*. There is no corresponding history of corruption instigated by pressure groups such as those identified in the concurring opinion. In the absence of such a history, California need not apply rules intended to disassociate political parties from their Tammany Hall heritage to interest groups such as the

[18]This linkage has a direct impact on judicial independence. Much of what courts do involves passing on the activities of the other branches of government. Thus, when a court rules upon the constitutionality of a statute, or reviews an administrative decision, or decides a criminal case brought by a district attorney, it necessarily reviews the legality of decisions made either by elected officials or those subordinate to and carrying out the policies of such officials. If, however, judges are subject to the same partisan forces as other elected officials, the electorate may perceive that such review will not be truly independent.

National Organization for Women, the National Right to Life Committee, or the Sierra Club.

C. There Are No Less Drastic Alternatives To Section 6(b) That Would Serve As Effectively The State's Interest In Promoting Public Confidence In The Impartiality And Nonpartisanship Of Its Judiciary.

In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion held that the State's interest in promoting impartial administration and freeing nonpartisan office holders from partisan pressures could be achieved by the State's nonpartisan election statutes without banning partisan political activity. App. to Pet. A8 & n.4. If the State's interest is defined as promoting the appearance of justice, however, these statutes became irrelevant.

We have seen above that California has a strong interest in preventing its judges from being identified as political partisans. *See* pp.__, *supra*. Prohibiting partisan "money, help, and endorsements" furthers that interest precisely. Even if the mechanics of nomination and voting remain formally nonpartisan, judicial candidates who are identified in billboards, bumper strips, newspaper advertisements, and television and radio commercials as candidates of a political party will inevitably be seen as partisan judges. Consequently, contrary to the Ninth Circuit's opinion, formal nonpartisanship is not enough. Section 6(b) is therefore "narrowly tailored" to further the State's interest in promoting judicial independence and nonpartisanship.[19]

[19]In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion relied heavily on the "fact" that California managed to have nonpartisan government for seventy years "without benefit of a formal ban on partisan advocacy . . . ." App. to Pet. A8 & n.4. During all but the last two years of that period, however, it was unclear whether California law in fact prohibited partisan involvement in nonpartisan elections. *Compare Unger v. Superior Court*, 102 Cal. App. 3d 681 (1980), *cert. denied*,, 449 U.S. 1131 (1981) (holding that California law prohibited such involvement) *with Unger v. Superior Court*, 37 Cal. 3d 612 (1984) (holding to the contrary). Indeed, the majority opinion

(continued...)

CONCLUSION

The petition for certiorari should be granted.

DATED: December 17, 1990.

Respectfully,

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK
A Professional Corporation

**Counsel of Record*
Attorneys for Amicus Curiae

---

[19](...continued)
itself admits that "because the legal status of [partisan] endorsements was unclear, political parties did not endorse candidates in 75% of California counties." App. to Pet. A1. Moreover, there is no evidence that political parties and party central committees were extensively involved in nonpartisan judicial elections during this period. *See* App. to Pet. A36 n.20 (concluding that the 1960 study relied on by the concurring opinion was unclear as to the extent of partisan involvement in judicial races). At most, the evidence suggests that three county central committees endorsed judges in the years prior to the first *Unger* decision. *See Unger v. Superior Court*, 102 Cal. App. 3d at 684-85 n.4.

Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
Telephone: (415) 677-6000
**Counsel of Record.*

Counsel for Amici Curiae
CALIFORNIA DEMOCRATIC PARTY;
EDMUND G. BROWN, JR., Chair,
California Democratic Party;
CALIFORNIA LIBERTARIAN PARTY;
[Other Amici listed on inside
front cover]

BOWNE OF SAN FRANCISCO INC • 190 NINTH ST • S.F. CA 94103 • (415) 864 2300

CONTINUED LISTING OF AMICI

GAIL LIGHTFOOT, Chair, California Libertarian Party; SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; CAROLE MIGDEN, Chair, San Francisco County Democratic Central Committee; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; SAM HARPER, Chair, San Francisco County Republican Central Committee; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ROBERT FARRAN, Chair, Los Angeles County Democratic Central Committee; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; LIZ FIGUEROA, Chair, Alameda County Democratic Central Committee; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; STEPHEN STAMM, Chair, Santa Clara County Democratic Central Committee; MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE; DAVID STRAND, Former Chair, Marin County Democratic Central Committee; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; RON ARRANTS, Chair, Solano County Democratic Central Committee; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; THOMAS ROMERO, Chair, Placer County Democratic Central Committee; CAROL SHERMAN, Mayor of Fairfax, WENDY BAKER, Former Mayor of Fairfax; NANCY L. PARENT, Councilwoman and Former Mayor of Pittsburg; EDDIE SOUZA, Mayor of Santa Clara; LAWRENCE E. STONE, Councilman and Former Mayor of Sunnyvale; DENNIS ZANE, Councilman and Former Mayor of Santa Monica; LIBBY DENEBEIM, Chair of the San Francisco Board of Education; MARY KING, Member of the Alameda County Board of Supervisors; NATIONAL COMMITTEE FOR PARTY RENEWAL; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; PROFESSOR EDMOND COSTANTINI; and PROFESSOR EUGENE C. LEE.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I.	
THIS COURT'S DECISION IN *EU* IS DISPOSITIVE OF THE ISSUE RAISED IN PETITIONERS' CERTIORARI PETITION	4
II.	
THE STATE CANNOT DEMONSTRATE A COMPELLING INTEREST SUFFICIENT TO JUSTIFY INFRINGEMENT OF THE POLITICAL PARTIES' FIRST AMENDMENT RIGHTS	6
A. The Desire to Prevent "Pressure" on Candidates Is Not A Legitimate, Much Less Compelling, Interest	7
B. The Guaranty Clause Does Not Permit California to Infringe the First Amendment Rights of Political Parties and Their Adherents	10
1. California's Interest Is Not "Compelling" Merely Because It Is Purportedly Acting Pursuant to a Constitutional Grant of Power	11
2. Actions Taken Pursuant to Constitutional Grants of Power Must Not Abridge Constitutional Freedoms	12
C. Petitioners' Reliance on *Letter Carriers* and *Austin* Is Misplaced	12
1. *Letter Carriers*	13
2. *Austin*	14

TABLE OF CONTENTS

Page

III.

SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE THE STATE'S ASSERTED INTEREST IN PRESERVING NONPARTISANSHIP 16

IV.

THE ASSERTED INTEREST IN JUDICIAL INDEPENDENCE DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Page

Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 13

Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) 12, 13, 14

Concerned Democrats of Florida v. Reno, 458 F. Supp. 60 (S.D. Fla. 1978) 19

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) ..... *passim*

Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 14, 15

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 8

Geary v. Renne, 880 F.2d 1062 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) 4, 8, 17

Geary v. Renne, 911 F.2d 280 (9th Cir. 1990) .... *passim*

Kusper v. Pontikes, 414 U.S. 51 (1973) 16

Meyer v. Grant, 486 U.S. 414 (1988) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 12

San Francisco Democratic Cent. Comm. v. Eu, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) 9

Tashjian v. Republican Party, 479 U.S. 208 (1986) 3, 8, 11

Texas v. White, 7 Wall. 700 (1869) 12

Statutes

United States Constitution:

Article. I, section 4 11

Article IV, section 4 10

First Amendment ..... *passim*

Fourteenth Amendment 12

TABLE OF AUTHORITIES

Statutes

	Page
United States Code:	
5 U.S.C. section 7324 (Hatch Act)	13, 14
California Constitution:	
Article II, section 6(b)	*passim*
California Elections Code:	
section 37	16
section 6401.5	16
section 10200.5	17
section 10207	17
section 10214	17

Other Authorities

D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 12

L. Tribe, *American Constitutional Law*, 398 (2d ed. 1988) 12

No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTERESTS OF THE AMICI

The California Democratic Party and its chair, Edmund G. Brown, Jr.; the California Libertarian Party and its chair, Gail Lightfoot; the San Francisco, Los Angeles, Alameda, Santa Clara, Marin, Solano, and Placer County Democratic Central Committees, and the chairs of each of these county central committees and the former chair of the Marin County Democratic Central Committee; and the San Francisco County Republican Central Committee and its chair, Sam Harper, are interested in preserving and exercising the parties' First Amendment rights to endorse, support, or oppose candidates running for local nonpartisan offices.

Carol Sherman, Mayor of Fairfax, Wendy Baker, Councilwoman and former Mayor of Fairfax, Nancy L. Parent, Councilwoman and former Mayor of Pittsburg, Eddie Souza,

Mayor of Santa Clara, Lawrence E. Stone, Councilman and former Mayor of Sunnyvale, Dennis Zane, Councilman and former Mayor of Santa Monica, Mary King, member of the Alameda County Board of Supervisors, and Libby Denebeim, chair of the San Francisco Board of Education, are interested in having the right to seek and publicize the endorsements and support of political parties and in promoting responsive local government accountable to the electorate.

The National Committee for Party Renewal and the Northern California and Southern California Committees for Party Renewal are organizations composed of prominent political scientists and political practitioners interested in the rejuvenation of America's political parties. Professors Edmond Costantini and Eugene C. Lee are interested in maintaining the appropriate relationship between political parties and local government.

The Ninth Circuit Court of Appeals granted leave to Amici to file their brief in support of respondents' Petition for Rehearing and Suggestion for Rehearing En Banc and to participate in the oral argument before the *en banc* court.

SUMMARY OF ARGUMENT

This case concerns the straightforward issue of whether article II, section 6(b) of the California State Constitution infringes the First Amendment rights of California's political parties and their adherents by prohibiting those parties from endorsing, supporting, or opposing candidates for nonpartisan office. Just one year ago, this Court unanimously reaffirmed the profound constitutional significance of precisely this type of free expression in the political arena in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) ("*Eu*").

Supreme Court Rule 10 makes clear that petitions for writs of certiorari are appropriate only where certain "special and important reasons" arise necessitating this Court's ultimate decision. Here, where a recent and comprehensive decision of this Court struck down a ban on speech virtually identical to section 6(b), and where an *en banc* panel of the Ninth Circuit Court of Appeals

correctly applied that recent precedent, certiorari should be denied.

Endeavoring to distinguish this case from *Eu*, petitioners assert a "compelling" interest in preserving nonpartisanship as the basis for their request for certiorari, yet this interest — "legitimate" at best — is insufficient to justify the infringement of the identical First Amendment rights championed in *Eu*. Petitioners offer nothing more than speculation to support their argument that endorsements by political parties will ultimately lead to the demise of nonpartisanship. Where myriad cases of this Court exact a high standard of proof to justify infringement of free speech, petitioners' empty conjecture does not carry their burden.

Petitioners' invocation of the Guaranty Clause does not alter this analysis. As this Court has repeatedly observed, a state's interest is not perforce compelling merely because a state acts pursuant to a constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986).

Petitioners' claim that section 6(b) is necessary to ensure a "fair and impartial" local government and judiciary is singularly unconvincing and unsupported in the record. Arguing, in effect, that the electorate must be protected from the endorsements of political parties, petitioners' argument reduces to the "paternalism" squarely rejected by this Court in *Eu*. Moreover, petitioners' asserted state "interest" does not apparently extend to the endorsements made by political clubs, political action committees, politicians, special interest groups, labor unions, newspapers and slate mailer vendors. As this Court recognized in *Eu*, however, "[t]here is no evidence that an endorsement issued by [a party] carries more weight than one issued by a newspaper or labor union." *Eu*, 489 U.S. at 228 n.18. Petitioners cannot overcome this gap in logic.

Finally, even if this Court were to accept petitioners' claim that their interest is compelling, section 6(b) is not the least restrictive means for achieving the end sought by petitioners. This Court has repeatedly recognized that

> [i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only

> if the state shows that it advances a compelling state interest and *is narrowly tailored to serve that interest.*

Eu, 489 U.S. at 222 (emphasis added; citations omitted). As the Ninth Circuit correctly found, section 6(b) cannot pass this constitutional muster.

ARGUMENT

I.

THIS COURT'S DECISION IN *EU* IS DISPOSITIVE OF THE ISSUE RAISED IN PETITIONERS' CERTIORARI PETITION

Petitioners focus this Court's attention on California's asserted interest in preserving nonpartisanship as the justification for section 6(b)'s incursions on free speech. However, as Justice Canby observed in dissent from the original Ninth Circuit decision, "[t]he State's measure is directed at the *content of speech*, in order indirectly to achieve political consequences. That is its prime flaw." *Geary v. Renne*, 880 F.2d 1062, 1085 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) (emphasis added). The keystone of this case is *not* nonpartisanship — which, after all, is merely one method for the selection of candidates[1] — but

[1] Petitioners' concept of "nonpartisanship" and what that concept embraces is unjustifiably expansive. As Justice Reinhardt pointed out, nonpartisanship signifies nothing more than that the candidates were not selected in primary elections by the political parties. *Geary v. Renne*, 911 F.2d 280, 287 (9th Cir. 1990) (*en banc*) (Reinhardt, J., concurring). "[T]he people of California may not suppress free speech on the excuse that they are merely determining *the method by which candidates will be elected.*" *Id.* (emphasis added). Thus, merely because a race is denoted nonpartisan, does not screen undue influence from any quarter nor bar party affiliation from playing a part. Indeed, one can run for *partisan* office in a nonpartisan manner, as do coalition candidates, and nonpartisan candidates may emphasize their party affiliation, as was Tom Bradley's practice in the Los Angeles mayoral race. *See id.* at 288. Petitioners do not suggest that nonpartisan candidates who so stress their partisanship should also have their speeches and advertisements censored.

rather, whether California's political parties and their adherents are entitled to the same freedom of speech in the political arena as all other entities and citizens. *See Geary*, 911 F.2d at 288 (Reinhardt, J., concurring). This Court has already emphatically resolved this question.

> We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.

Eu, 489 U.S. at 223 (citations omitted).

Section 6(b)'s draconian ban on endorsements in nonpartisan elections burdens parties' free speech rights as much as the "particularly egregious" ban on endorsements in primary elections did in *Eu*, a fact implicitly recognized by this Court in that decision. *Id.* at 224. "Free discussion about candidates for public office is no less critical before a primary than before a general election." *Id.* at 223. As the Ninth Circuit noted: "It is indisputable that the restrictions embodied in section 6(b) implicate appellees' First Amendment rights. The ban on endorsements directly affects political speech, 'the inviolability of which rests at the core of the First Amendment'." *Geary*, 911 F.2d at 283 (quoting *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989)).

In attempting to distinguish *Eu*, petitioners mistakenly argue that *Eu's* holding is restricted to partisan primary elections. In fact, *Eu's* rationale — that any law which interferes with a political party's ability to communicate with its members about a candidate's qualifications constitutes a "particularly egregious" burden on its freedoms of speech and association — applies with equal and undiminished force here. Prohibitions on endorsements "directly hamper[ ] the ability of a party to spread its message and hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. The Ninth Circuit correctly rejected petitioners' limitation, holding

that the broad principles articulated in *Eu* applied to political speech in *all* elections:

> [T]here is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

Geary, 911 F.2d at 284.

Similarly, petitioners' efforts to restrict the foundation for the *Eu* decision to this Court's observation that parties have the right to "communicate with its members concerning *[their] own decision-making process*" (*see* Petitioners' Brf. at 11; emphasis in original) cannot be credited. *Eu* clearly spoke to the central importance of political speech to the guarantees of the First Amendment and rested its holding thereon. *Eu*, 489 U.S. at 222-23 ("The ban directly affects speech which is at the core of our electoral process and of the First Amendment freedoms") (citation omitted).

Despite petitioners' attempts to find limiting distinctions in *Eu*, the fact remains that this Court's very recent First Amendment analysis in *Eu* governs this case. Section 6(b) clearly offends the same settled constitutional principles transgressed in *Eu*, thus obviating the need for further review by this Court.

II.

THE STATE CANNOT DEMONSTRATE A COMPELLING INTEREST SUFFICIENT TO JUSTIFY INFRINGEMENT OF THE POLITICAL PARTIES' FIRST AMENDMENT RIGHTS

Petitioners advance several arguments to support their claim that the state's interest in nonpartisanship reaches the requisite compelling interest standard sufficient to override the political parties' First Amendment rights. As the Ninth Circuit correctly held, none of petitioners' arguments has merit. *See Geary*, 911

F.2d at 283-86. California "has no compelling interest in limiting the people's right to make informed choices or to select candidates for office on whatever basis they deem relevant." *Id.* at 288 (Reinhardt, J., concurring).

A. The Desire to Prevent "Pressure" on Candidates Is Not A Legitimate, Much Less Compelling, Interest

Petitioners assert that party endorsements will lead to "pressure" on candidates to "tailor their views and decisions on important issues to the party line," which, in turn, will undermine the impartial administration of the laws (Petitioners' Brf. at 8, 10). As the Ninth Circuit held, however, the record is devoid of support for this contention:

> We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy, and the *State has offered nothing but speculative evidence to support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.*

Geary, 911 F.2d at 285-86 (emphasis added). The concurring opinion, in even stronger language, also remarked on this absence of supporting evidence:

> I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind — almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.

Id. at 289 (Reinhardt, J., concurring).[2]

[2] Indeed, the history of nonpartisanship in California supports *respondents'* and *Amici's* position that the goal of nonpartisanship in local California politics can be achieved *without* section 6(b).

Equally important, the mere fact that nonpartisan officeholders in the future might listen to the views of political party organizations *does not* signal either imminent corruption or an undermining of fair and impartial government. Officeholders are supposed to be responsive to the views of all voters, including the voters who organize themselves in party organizations. As the Ninth Circuit noted:

> Even if California is correct, and the availability of partisan endorsements *in the future* does produce nonpartisan officeholders more sensitized to party preferences, that result will have been effected through the exercise of informed voter choice — a mechanism with which the State may not interfere out of a concern that, in the absence of regulation, the voters will misperceive their own best interests.

Geary, 911 F.2d at 286 n.5 (emphasis in original) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 n.31 (1978)).

Petitioners further argue for a suppression of speech due to the possibility that voters will perceive that some candidates are "beholden" to political parties. *See* Petitioners' Brf. at 9. However, there is no evidence that the public's knowledge that certain candidates have been endorsed — by any source — necessarily translates to a perception that those individuals are "beholden" to the endorser. In essence, petitioners argue that information should be *kept from* voters due to the effect it will have on the voters; this position directly conflicts with both the First Amendment and this Court's holdings. Indeed, this Court has deemed this " 'highly paternalistic approach' limiting what people may hear [] generally suspect, [finding it] particularly egregious where the State censors the political speech a political party shares with its members" (*Eu*, 489 U.S. at 223-24 (citations omitted)) and has repeatedly pronounced its "faith in the ability of individual voters to inform themselves about campaign issues." *Tashjian*, 479 U.S. at 220. *See also Geary*, 880 F.2d at 1085-86 (Canby, J., dissenting) (Section 6(b) "permits California to suppress political expression because the voters might misuse the information. Our entire First Amendment jurisprudence is to the contrary"). *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) makes clear that, in a

democracy, it is up to the *voter* to determine what weight to give endorsements:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

Id. at 791-92.

Finally, petitioners' prediction of the dangers inherent in the alleged *quid pro quo* of the endorsement process suffers from a fatal illogic. Countless political clubs, political action committees, special interest and pressure groups, politicians, labor unions, newspapers and for-profit state mailer vendors[3] are free to endorse under section 6(b). Many of these entities, as well as individual politicians, are able to raise far more funds than the official political parties, which the Ninth Circuit has described as "weak and fossilized." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).[4] It makes no sense to suppress the speech of political parties — which have a more diverse membership and which are more accountable than the other groups listed above — while simulta-

[3] The prevalence of paid-for "pseudo-official mailers" (*Geary*, 911 F.2d at 293) which invoke political party labels serves only to confuse a public seeking party guidance.

> Many of these private slate mailers, despite small print disclaimers, use the name of a political party and appear to the average voter to contain official party endorsements. If political parties were to be prohibited from making endorsements in . . . campaigns, then . . . candidates who might otherwise seek an honest endorsement for a legitimate political party might be compelled to buy spurious party endorsements — to pay thousands of dollars to be included on slate mailers sent out by private operators who may have no convictions about anything.

Id. at 294 (Reinhardt, J., concurring) (footnote omitted); *see also Eu*, 489 U.S. at 228 n.18.

[4] Even were parties as influential as petitioners paint them, "speech cannot be prohibited on the ground that it is effective." *Geary*, 911 F.2d at 289 (Reinhardt, J., concurring).

neously permitting all other entities and individuals to endorse candidates in nonpartisan elections.

> The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and . . . philosophy.

Geary, 911 F.2d at 292-93 (Reinhardt, J., concurring).

B. The Guaranty Clause Does Not Permit California to Infringe the First Amendment Rights of Political Parties and Their Adherents

As further support for their contention that California may silence political party endorsements in nonpartisan races, petitioners rely on the U.S. Constitution's guarantee of a republican form of government (the "Guaranty Clause"). Petitioners assert that because California's interest in structuring state government is recognized in the U.S. Constitution, it is *per se* compelling (Petitioners' Brf. at 6-7). Petitioners' argument is doubly flawed: *first*, a state's interest is not "compelling" in the First Amendment context merely because the state acts under an express constitutional grant of power; and *second*, actions taken pursuant to constitutional grants of power cannot abridge fundamental First Amendment rights.[5]

---

[5] Petitioners' argument is further undermined because it is unclear whether the Guaranty Clause grants *any* powers to the states. It has long been held that it is *Congress'* province to enforce the guarantee of a republican government. *See, e.g., Baker v. Carr*, 369 U.S. 186, 220 (1962). Petitioners' brief notably lacks any citation to case law in which a state's enactment has been upheld pursuant to the Guaranty Clause.

Moreover, the Guaranty Clause does not empower a state to establish whatever type of government it chooses; it guarantees only a "republican form of government." U.S. Const. art. IV, § 4. It is, therefore, erroneous to suggest that every state decision regarding government structure, such as partisan versus nonpartisan, automatically receives the protection of the Guaranty Clause. Indeed, the full text of the Guaranty Clause belies such an expansive reading and indicates that Congress merely guarantees that the states will be protected from insurrection and invasion, and will be assured a basic form of government in accordance with fundamental republican principles. *See id.*

1. California's Interest Is Not "Compelling" Merely Because It Is Purportedly Acting Pursuant to a Constitutional Grant of Power

Petitioners rely heavily on Justice Rymer's dissent from the *en banc* decision for the proposition that "the constitutional origin of California's interest in the nonpartisan structure of local government renders that interest compelling *per se*" (Petitioners' Brf. at 6-7). Petitioners are mistaken.

A state's interest is not compelling merely because the state acts pursuant to an explicit constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian*, 479 U.S. at 217. In *Eu* and *Tashjian*, this Court recognized that the statutes at issue in those cases were enacted pursuant to an explicit constitutional grant of power, *i.e.*, the right to regulate the time, place, and manner of elections. U.S. Const. art. I, § 4. However, this Court did not end its inquiry there and automatically term the states' interest "compelling." In *Tashjian*, this Court declared that a reviewing court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Tashjian*, 479 U.S. at 214. After evaluating Connecticut's interests, this Court termed them "insubstantial." *Id.* at 225. Similarly, in *Eu*, this Court held that California's "ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest." *Eu*, 489 U.S. at 229.

Significantly, both *Eu* and *Tashjian* recognized the difference between a state's *power* to act and a state's *interest* in taking action. Each opinion recognized that the state had a fundamental power to regulate elections; however, this power was not immune from a First Amendment challenge. In each opinion, this Court inquired whether the state was acting to achieve a compelling

state interest. Here, simply attaching the label "per se compelling" does not carry petitioners' burden of affirmatively presenting a compelling justification for section 6(b).

2. Actions Taken Pursuant to Constitutional Grants of Power Must Not Abridge Constitutional Freedoms

This Court has flatly rejected the notion that the Guaranty Clause justifies otherwise unconstitutional actions. *See Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (In striking down Alabama apportionment, Court held that Congress, even acting under the Guaranty Clause, "simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights"); *Texas v. White*, 7 Wall. 700, 729 (1869) ("In the exercise of the power conferred by the guaranty clause, . . . [i]t is essential . . . that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution").

Even commentators who ascribe an expansive meaning to the Guaranty Clause recognize that under no reading could the Clause entitle a state to abridge fundamental constitutional freedoms:

> [T]he guarantee clause does not give the states carte blanche to order their government systems. Other constitutional provisions impose a variety of restrictions on a state's freedom to structure its governmental processes.

D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 44 (1988); *see also* L. Tribe, *American Constitutional Law* 398 (2d ed. 1988) (assuming that a state can invoke the Guaranty Clause, a state's structural choices are still constrained by the constitutional limitations applicable to states by the Fourteenth Amendment).

C. Petitioners' Reliance on *Letter Carriers* and *Austin* Is Misplaced

Petitioners rely heavily on two cases, *Civil Service Comm'n v. Letter Carriers* ("*Letter Carriers*"), 413 U.S. 548 (1973) and *Austin v. Michigan Chamber of Commerce* ("*Austin*"), 110 S. Ct. 1391 (1990), to support their argument that banning the political speech of California's political parties is both compelling and justified. Neither case is apposite.

1. *Letter Carriers*

Petitioners argue that *Letter Carriers* recognized an interest in impartial government as compelling, that section 6(b) serves that same interest, and that therefore section 6(b) should be upheld because it advances that interest. *See* Petitioners' Brf. at 8-11. Petitioners' syllogism is fatally flawed, however, in that this Court has specifically *rejected* the argument that an interest in impartial government justifies a ban on endorsements in partisan elections. *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

In *Buckley*, the government argued that *Letter Carriers* supported a federal restriction on independent campaign expenditures during candidate elections. This Court termed the government's reliance on *Letter Carriers* "mistaken[]", holding that *Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections:

> In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the [*Letter Carriers*] Court *repeatedly emphasized* the statutory provision and corresponding regulation permitting an employee to "'*[e]xpress his opinion* as an individual privately *and publicly* on political subjects and *candidates*.'" [The Court] carefully declined to endorse provisions threatening political expression. The Court did not rule on the constitutional questions presented by the regulations forbidding *partisan campaign endorsements* through the media and speechmaking to political gatherings . . . .

Buckley, 424 U.S. at 48 n.54 (emphasis added) (citations omitted).[6]

In effect, petitioners misread the governmental interests at stake in *Letter Carriers* as having a broader application than that

---

[6] This section of *Buckley* was joined by seven of the eight justices who took part in the decision.

which this Court enunciated therein. Thus, while this Court recognized the impartial administration of government as a compelling interest justifying the restrictions of the Hatch Act, it did so in the limited context of federal government employees, explicitly distinguishing this class from the general public:

> [T]he government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

Letter Carriers, 413 U.S. at 564 (citation omitted).

Petitioners' reliance on *Letter Carriers* ignores this obvious and crucial distinction between elected office and civil service. In enacting the Hatch Act, Congress was reacting to the unique threat that a government employee's job security and potential for advancement would depend on her currying favor with establishment politicians. *Letter Carriers*, 413 U.S. at 566. The voters would have no say in any improper promotion or firing and virtually no recourse to protest such subversion of the merit system. By contrast, the people of California have an obvious recourse against any candidate whom they perceive to be improperly beholden to a political party — they can vote against her.

2. Austin

Petitioners' attempt to save section 6(b) by resort to this Court's decision in *Austin* reflects a basic misunderstanding of the state interest involved in that case. Contrary to petitioners' reading, the *Austin* Court was concerned not with *political* organizations such as the California Democratic and Libertarian Parties or Massachusetts Citizens for Life but, rather, with the excessive political influence of *commercial* organizations, such as the Michigan Chamber of Commerce. *See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") (Court struck down state law regulating expenditures of some corporations, despite recognizing advantages gained through the corporate form).

MCFL and *Austin* both teach that when a commercial organization, through largesse, gains power unrelated to its political popularity, there is a potential for corruption.[7] Endeavoring to bootstrap political parties to fit within the reasoning of *Austin*, petitioners awkwardly equate statutory benefits with the financial power addressed in that case. Contrary to petitioners' argument, however, the mere presence of state-conferred advantages does not, without more, trigger a corruption concern. *See MCFL*, 479 U.S. at 259-63.

In fact, political parties *do not* give rise to the corruption concern of *Austin* precisely because their political power derives directly from their *political* popularity. A *political* organization does not unfairly exploit its influence when it exercises political power, even if that power derives from state-conferred advantages:

> "[Certain groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *That description applies equally well to the political parties targeted by § 6(b).*

Geary, 911 F.2d at 284 (emphasis added) (quoting with emphasis added, *MCFL*, 479 U.S. at 259).

In direct conflict with this express holding, and with no citation to authority or the record, petitioners contend that "state statutes provide ballot-qualified political parties with resources and advantages which are not simply a function of the parties' popularity in the political marketplace" (Petitioners' Brf. at 14 n.6). Petitioners would thus have this Court believe that the influence of the

---

[7] Justice Reinhardt made a similar observation:

> In the case at hand, it does not take much wisdom to know that, whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties — or even from the Libertarians — *but rather from the corrupting influence of money in politics* — that is, from massive political contributions.

Geary, 911 F.2d at 287 (Reinhardt, J., concurring) (emphasis added).

California Democratic Party and the influence of the California Peace and Freedom Party, for example, are due not to their respective political popularity, but to the fact that California law provides them with "advantages." However, because all ballot-qualified parties receive similar statutory "advantages," and because the California Democratic and Peace and Freedom Parties have grossly disparate influence, petitioners' argument is demonstrably wrong.[8]

III.

SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE THE STATE'S ASSERTED INTEREST IN PRESERVING NONPARTISANSHIP

Because section 6(b) affects political expression and participation, it must be narrowly drawn to avoid unnecessary restrictions of constitutionally protected freedoms. *Eu*, 489 U.S. at 221-22; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* (citation omitted). Even if this Court accepts, *arguendo*, petitioners' interest as "compelling," section 6(b) is not the least restrictive means for preserving nonpartisanship.

Indeed, the Ninth Circuit detailed at length the several provisions of the California Elections Code designed to safeguard the nonpartisan character of local and judicial elections. *Geary*, 911 F.2d at 285 n.4, *citing* Cal. Elec. Code § 37 (forbidding party participation in nomination of candidates for nonpartisan office); Cal. Elec. Code § 6401.5 (forbidding references to party affiliations in declarations of candidacy and nominations papers); Cal. Elec. Code § 10200.5 (forbidding name of party of which candidate belongs from appearing on ballot); Cal. Elec. Code § 10214 (permitting voter to cast ballot for candidate for nonpartisan office without regard to party affiliation); Cal. Elec. Code § 10207 (requiring partisan and nonpartisan offices to be listed in separate columns on ballot form). In discussing section 6(b)'s application to the judiciary, Justice Reinhardt offered still more options falling short of suppressing speech. *Geary*, 911 F.2d at 294-95.

Petitioners made no showing below, apart from discredited speculation, that the asserted state interest in preserving the nonpartisan structure of government could not be served by these various statutory provisions without resort to the total foreclosure of political speech mandated by section 6(b). Petitioners' brief does not remedy this absence of proof and speaks only in conclusory terms. In the face of these alternative measures and with literally no support for their contention that section 6(b) is the only effective method for preservation of nonpartisanship, petitioners' argument must be rejected.

IV.

THE ASSERTED INTEREST IN JUDICIAL INDEPENDENCE DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH

As Justice Canby observed in his dissent to the original Ninth Circuit opinion, by choosing to subject its judges to election, California has necessarily injected politics into the judiciary. *Geary*, 880 F.2d at 1085 (Canby, J., dissenting). Having done so, it does not make sense to permit special interest groups, political action committees, Democratic and Republican clubs, and the like to endorse or oppose judges, yet simultaneously prohibit political parties from participation. As Justice Canby noted,

> The political threat to judicial independence, is attributable . . . far more to the decision to elect judges in the first place, and to subject them to reelection, than it is to party endorsement.

Id.

---

[8] Justice Kennedy termed the statute at issue in *Austin* "the most severe restriction on political speech ever sanctioned by this Court" (*Austin*, 110 S.Ct. at 1425-26 (Kennedy, J., dissenting)); yet the *Austin* statute placed no restrictions on the right to endorse and even allowed *for-profit nonpolitical* corporations to make expenditures, if channeled through segregated funds. In contrast, section 6(b) prohibits endorsement, support, and opposition of candidates by political parties, thus constituting a far greater burden on First Amendment rights than did the *Austin* statute.

A state, after making the voluntary choice to have certain offices elected, cannot attempt to suppress political speech in the interest of keeping those elections pristine. *Meyer v. Grant*, 486 U.S. 414 (1988). In *Meyer*, this Court struck down Colorado's ban on paying persons to circulate initiative petitions. Colorado had voluntarily created the initiative process and, in enacting the ban, wanted to preserve the integrity of that process by preventing fraud or undue influence on the voters. *Id.* at 419, 424. This Court unanimously declared Colorado's interest insufficient to justify the burden on speech in an area where "the importance of First Amendment protections is 'at its zenith.'" *Id.* at 425 (citation omitted).

In arguing for the specific need to keep judges above the political fray, petitioners cannot reconcile why the judiciary can remain immune from private interest pressure on its own, but must be actively protected from the speech of political parties. Justice Reinhardt recognized the internal inconsistency of such a position:

> [I]t cannot be seriously argued . . . *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who can truly control his destiny — the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible — *and* at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

Geary, 911 F.2d at 291 (emphasis in original; footnote omitted).

It is plainly illogical to argue that the cash-rich special interest groups which were so visible during California's 1986 judicial retention election do not undermine the independence of the judiciary while the endorsements of California's political parties most certainly will. As Justice Reinhardt observed:

> Given that many of the arguments befouling today's judicial campaigns are harmful to the health of the state judiciary, there is little reason to single out political endorsements, which are surely a cut above much that currently passes for "debate on public issues [that is] uninhibited, robust, and wide-open."

Geary, 911 F.2d at 293 (citation omitted); *see generally id.*, 911 F.2d at 291-94 (Reinhardt, J., concurring) (discussion of endorsements by a wide variety of special interest groups in California Supreme Court judicial retention election).

The statute at issue in *Concerned Democrats of Florida v. Reno*, 458 F. Supp. 60 (S.D. Fla. 1978), cited by petitioners, specifically addressed the issue of endorsements in judicial elections. In striking down that statute, the court enumerated several less restrictive alternatives to banning this type of speech, among which was the court's observation that judicial offices were nonpartisan by law, as in California. *See id.* at 65.[8] As that court stated, an interest in preserving judicial independence does "not fit tightly enough" with the sweeping suppression of political speech (*id.*) imposed by section 6(b).

Petitioners simply have no logical argument which addresses why political party endorsements will sully judicial integrity while private interest endorsements will allow judicial candidates to remain untainted. Thus, as Justice Reinhardt accurately observed,

> While it is undoubtedly clear to all that California could not prohibit *all* endorsements in judicial elections, in this case it

---

[8] Petitioners' citation to *Concerned Democrats* (Petitioners' Brf. at 6 n.3) incorrectly implies that the court in that case found Florida's statute prohibiting political parties from "endorsing, supporting or assisting candidates in judicial campaigns" (*id.*) violative of the First Amendment due to the statute's overbreadth. In fact, that court found that less restrictive alternatives were available, thus invalidating the statute on that basis. *Concerned Democrats*, 458 F. Supp. at 65. Moreover, petitioners incorrectly imply that the *Concerned Democrats* court differentiated between parties and partisan organizations in making their ruling. To the contrary, the court there was concerned with speech restrictions on groups generally and struck down the statute because "[Florida] cannot also control private citizens who wish to make their choices known." *Id.*

> is equally clear that it cannot single out one form of disfavored speech and ban it.

Geary, 911 F.2d at 294 (emphasis in original). Section 6(b)'s muzzle on political parties does nothing to advance petitioners' interest in an independent judiciary and does far too much in trespassing upon the parties' guaranteed freedom of speech under the First Amendment.

CONCLUSION

As in *Eu*, "California . . . never adequately explains how banning parties from endorsing or opposing . . . candidates [for nonpartisan office] advances [its asserted] interest." *Eu*, 489 U.S. at 226. Absent this nexus, section 6(b) must fail. For this reason and the reasons set forth above, Amici respectfully request that the petition for writ of certiorari be denied.

Dated: December 15, 1990

Respectfully submitted,

CEDRIC C. CHAO
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
MORRISON & FOERSTER

By _____
Cedric C. Chao
Counsel of Record
Attorneys for Amici Curiae

MOTION FILED
FEB 28 1991

(9)

No. 90-769

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600

Attorneys for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

	Page
Table Of Authorities	iii
Motion For Leave To File Brief Amicus Curiae In Support Of Petitioners	vii
Interest Of Amicus Curiae	1
Argument	2
I. California Has A Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary.	2
II. Section 6(b) Serves The State's Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary By Preventing California's Judges From Being Perceived As Partisan.	4
III. Section 6(b) Is Narrowly Tailored To Serve The State's Compelling Interest In Promoting Public Confidence In The Impartiality Of Its Judiciary.	12
A. The Ninth Circuit's Opinions Ignore Recently Enacted Limits On Contributions To Judicial Candidates In California As Well As The Substantial Differences Between Partisan Political Activity And Campaign Contributions.	13
B. Section 6(b) Is Not Underinclusive Because It Addresses Only Political Parties, And Not Other Interest Groups That Participate In Judicial Campaigns.	15

Page

C. There Are No Less Drastic Alternatives To Section 6(b) That Would Serve As Effectively The State's Interest In Promoting Public Confidence In The Impartiality And Nonpartisanship Of Its Judiciary. 17

Conclusion 18

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 3

Baker v. Carr, 369 U.S. 186 (1962) 11

Bridges v. California, 314 U.S. 252 (1941) 7

Buckley v. Valeo, 424 U.S. 1 (1976) 14

Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179 (1939) 6

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 8, 10, 11

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 9

Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) 9

Gregg v. Georgia, 428 U.S. 153 (1976) 7

In re Murchison, 349 U.S. 133 (1955) 3

Levine v. United States, 362 U.S. 610 (1960) 3

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 3, 15

Mistretta v. United States, 488 U.S. 361 (1989) 11, 15

Offutt v. United States, 348 U.S. 11 (1954) 3

	Page
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	7
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	3
Rose v. Mitchell, 443 U.S. 545 (1979)	3
Rutan v. Republican Party of Illinois, -- U.S. --, 58 U.S.L.W. 4872 (1990)	10
Service Employees International Union v. Fair Political Practices Commission, 747 F. Supp. 580 (E.D. Cal. 1990), *application for stay of enforcement pending appeal denied sub nom. Kopp v. Service Employees International Union*, -- U.S. --, 59 U.S.L.W. 3307 (Oct. 12, 1990)	14
Unger v. Superior Court, 37 Cal. 3d 612 (1984)	5, 18
Unger v. Superior Court, 102 Cal. App. 3d 681 (1980), *cert. denied*, 449 U.S. 1131 (1981)	17-18
White v. Davis, 13 Cal. 3d 757 (1975)	6
Wood v. Georgia, 370 U.S. 375 (1962)	7
Young v. U.S. ex rel. Vuitton et Fils, S.A., 481 U.S. 787 (1987)	3

Statutes and Regulations

	Page
California Constitution	
art. II, §6(a)	passim
art. II, §6(b)	passim
art. II, §2-3/4 (1926)	5
Cal. Code Civ. Proc. §170.6	15
Cal. Gov't Code	
82023	14
85102	13
85300	15
85301(a)	13
85303(a)	13
Cal. Stats. 1913, ch. 690, §5	5
5 U.S.C.	
§7324(a)(2)	9
§7326	9
28 U.S.C. §455(a)	3

Other Authorities

	Page
ABA Model Code of Judicial Conduct, §3E(1)	15
1 American Commonwealth 507 (3d ed. 1905)	8
California Ballot Pamphlet, June 3, 1986 Primary Election	5-6, 8
P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980)	7
Note, Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 STAN. L. REV. 449 (1988)	14

Page

Schotland, Elective Judges' Campaign Financing, 2 J. L. & POL. 57 (1985) 12

Special Commission on the Administration of Justice in Cook County, A Report on Judicial Selection (1985) 9

State of New York Commission on Government Integrity, Becoming a Judge: Report on the Failings of Judicial Elections in New York State (1988) 10

No. 90-769

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

VS.

BOB GEARY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.4, the California Judges Association ("CJA") seeks leave to file a brief amicus curiae in support of Petitioners. Counsel for Petitioners has given consent. Counsel for all Respondents except Terence Faulkner and Sudi Trippet has similarly consented. Letters seeking consent have been sent to Mr. Faulkner and Ms. Trippet, who both appeared *pro se* in this proceeding. Neither letter has been returned.

The CJA has a direct interest in this case. Its members include virtually every active and retired judge from the California Supreme Court, the California Courts of Appeal, and the State's Superior, Municipal and Justice Courts. If this litigation results in the invalidation of Article II, Section 6(b) of the California Constitution, each

member of CJA facing an election or retention campaign will obviously be affected. Moreover, the CJA and its members are concerned that permitting political parties to endorse candidates, make contributions, and otherwise participate in judicial elections will adversely affect the public's perception of California's judges as impartial and nonpartisan, a perception that CJA believes is essential for the California courts effectively and impartially to administer justice.

The brief amicus curiae which CJA seeks leave to file focuses on the special constitutional concerns applicable to campaigns for judicial office. In particular, the accompanying brief seeks to justify Article II, Section 6(b) as a means to further the State's compelling interest in promoting the appearance of justice, an interest mentioned only in passing in the petition for certiorari. The CJA thus believes that the accompanying brief may be helpful to the Court and, accordingly, requests leave to file.

DATED: February 28, 1991.

Respectfully,

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600

Attorneys for Amicus Curiae
CALIFORNIA JUDGES
ASSOCIATION

*Counsel of Record

BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae California Judges Association is the collective voice of the California state judiciary, the Nation's largest judicial system. It speaks for a membership comprising virtually every active and retired judge from the State's Supreme Court, Courts of Appeal, and Superior, Municipal and Justice Courts.

This case concerns the constitutionality of Article II, Section 6(b) of the California Constitution, which provides that "[n]o political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." Article II, Section 6(a) in turn makes "[a]ll judicial, school, county and city offices" nonpartisan.

Doubtless because these constitutional provisions affect campaigns for both judicial and non-judicial offices, neither the petition for certiorari nor the principal opinion below differentiates between judicial elections and elections for other nonpartisan positions. Indeed, even the two Ninth Circuit opinions that discuss whether invalidating Section 6(b) would threaten the independence of the judiciary seem more concerned with the pragmatic effects of the decision below than with whether analysis of Section 6(b)'s constitutionality might be different for judges than for other non-partisan officials.

Amicus believes that this difference is crucial for resolving the important First Amendment issue this case presents. Indeed, no analysis that treats judges fungibly with other local officials does justice to the interests at stake. For example, the Ninth Circuit discounted California's interest in maintaining "elected officials' independence from partisan political pressures" because it believed democracy is vindicated when "candidates and elected officials alter or reaffirm their own positions on issues in response to political messages . . . ." App. to Pet. A4-A5 (citation omitted). That may well be true for

local officials such as members of a county board of supervisors, school board, or city council. But for judges to "alter . . . their own positions on issues in response to political messages" is to violate their oaths of office.

Unlike municipal officials, or a members of a county board of supervisors or community college district, judges have the power permanently to deprive citizens of their life, liberty and property. Consequently, judges must both be fair—and appear to be so. As a result, the State has an interest in regulating judicial elections so as to preserve judicial independence that may be largely absent with respect to elections for less sensitive offices.

Amicus believes that Section 6(b) furthers the actuality and the appearance of justice by freeing California's judges from the stigma of partisanship. Indeed, Section 6(b) is a vital part of California's non-partisan judicial election system. That system has served California well. Although the California judiciary is larger than either the federal judiciary or that of any other State, the California courts have been notably free of corruption, scandal, or the misuse of judicial power for partisan ends. As the collective representative of the members of that judiciary, amicus believes that invalidation of Section 6(b) would threaten both the actuality and the appearance of justice, and therefore urges the Court to grant certiorari.

ARGUMENT

I.

CALIFORNIA HAS A COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

The petition for certiorari identifies two compelling interests served by Section 6(b): promoting impartial administration by local officials and judges and freeing those who hold nonpartisan positions from partisan pressure. Pet. 8-10. This brief focuses on a related, but distinct, interest: preserving the *appearance* of impartial justice.

This Court has often recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court has invoked this interest in a variety of contexts: to reverse state court judgments where the judge had a personal stake in the outcome (*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)); to hold under this Court's supervisory power that a party benefitting from a federal court order may not be appointed to prosecute a contempt action for a violation of that order (*Young v. U.S. ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987)); to grant the public and press a First Amendment right to attend criminal trials (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980)); and to hold that claims of discrimination in the selection of grand jury veniremen are cognizable on federal habeas corpus. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). Indeed, the notion that justice must both be fair and appear to be so is "deeply rooted in the common law," as well as in this Court's constitutional jurisprudence. *See Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The State's interest in preserving the appearance of justice is separate and distinct from, although obviously related to, the interest that justice in fact be done in any particular case. For this reason, the need to satisfy the appearance of justice "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136). Indeed, this Court has held that the need "to promote public confidence in the integrity of the judicial process" justifies the disqualification of judges under 28 U.S.C. §455(a), which requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," even if the judge has no knowledge of the facts creating an appearance of impropriety. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 859-60.

The distinction between the actuality of justice and its appearance has important ramifications for this case. The two Ninth Circuit opinions that specifically address Section 6(b)'s applicability to judicial elections differ as to whether invalidating that provision will threaten the *actuality* of justice by throttling judicial independence. *Compare* App. to Pet. A16-A20 (Reinhardt, J., & Kozinski, J., concurring) (Section 6(b)) "appears to be a particularly peculiar way of addressing the problem of maintaining judicial independence") *with id.* at A55-A66 (Alarcon, J. dissenting) (Section 6(b)) is the "only realistic safeguard of judicial independence"). In our view, however, the constitutionality of Section 6(b) should not turn on whether San Francisco has amassed sufficient proof that judges endorsed by political parties will in fact trim their decisions to the dictates of partisan politics. Instead, this Court should consider whether Section 6(b) serves the State's separate interest in preserving the appearance of justice.

As we shall now demonstrate, the California electorate believes that judges endorsed and supported by political parties cannot be truly independent. Moreover, this belief is solidly grounded in both historical experience and analysis of the prerequisites for an independent judiciary. Accordingly, Section 6(b) serves the State's compelling interest in promoting public confidence in the impartiality of its judges.

II.

SECTION 6(b) SERVES THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY BY PREVENTING CALIFORNIA'S JUDGES FROM BEING PERCEIVED AS PARTISAN.

California's nonpartisan judicial election system did not emerge from a vacuum. To the contrary, as the petition for certiorari and Judge Alarcon's dissent demonstrate, nonpartisanship was a direct response to pervasive partisan corruption of politics at the state and local level. Pet. 7-8; App. to Pet. A48-A50 (Alarcon, J., dissenting). Thus, in

1913, after numerous scandals led to the election of Governor Hiram Johnson on a platform of political reform, California enacted a statute barring political parties from nominating candidates for judicial office. Cal. Stats. 1913, ch. 690, §5. In 1926, the first reference to non-partisanship with respect to judicial elections was added to the California Constitution (Cal. Const., art. II, §2-3/4 (1926)), and in 1972 the California Constitution was amended explicitly to state that "[a]ll judicial, school, county, and city offices shall be non-partisan."

In 1984, the California Supreme Court held in *Unger v. Superior Court*, 37 Cal. 3d 612 (1984), that this language did not prohibit partisan endorsements in non-partisan races. At the very next general election the voters adopted Proposition 49, which added Article II, Section 6(b) to the California Constitution. As the petition for certiorari notes, the ballot argument in favor of Proposition 49 argued that an endorsement ban was necessary to prevent political party machines from controlling judges, school boards and local officials. Pet. 5; *see also* App. to Pet. A43 n.35 (Rymer, J., dissenting). However, the proponents of the measure placed equal importance on the need to preserve the *appearance* of justice, particularly with respect to judicial elections. Thus, the ballot argument in support of Proposition 49 stated:

> "WHEN PARTY BOSSES HAVE HAD A STRANGLEHOLD ON LOCAL POLITICS ELSEWHERE, HOWEVER, CORRUPTION IN CITY HALL AND IN THE COURTS OFTEN HAS BEEN THE RULE . . . NOT THE EXCEPTION.
>
> "To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> "WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN—NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE

ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?" (California Ballot Pamphlet, June 3, 1986 Primary Election, at 26)

The opponents of Section 6(b) did not quarrel with the need to promote judicial independence, or to remove judges from the partisan arena. Instead, they contended, in the rebuttal to the argument quoted above, that Proposition 49 was overbroad, because it dealt with city, county and school board officers, as well as judges:

> "Proposition 49 is far too broad just to deal with partisan involvement in judicial elections. It prohibits party recommendations in all city and county elections. There should be a much narrower ballot measure for judicial elections." (*Id.* (emphasis added))

In adopting Proposition 49 by a substantial (56%-44%) margin, California voters accepted the contention that permitting partisan involvement in judicial elections would threaten the impartiality of the judiciary.[1] That belief in and of itself provides a constitutionally sufficient reason to hold that Section 6(b) serves a compelling interest. If the California electorate believes—as the passage of Proposition 49 indicates—that partisan involvement in judicial elections threatens the impartiality of the State's judges, permitting such involvement will inevitably lessen public respect for the courts and thus threaten the appearance of justice.[2]

---

[1]Although this Court does not seem to have addressed the issue, "California decisions have long recognized the propriety of resorting to . . . election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." *White v. Davis*, 13 Cal. 3d 757, 775, n.11 (1975); *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal. 2d 179, 185 (1939).

[2]Because justice must both be fair and appear to be so, this argument does not turn on whether increasing partisanship in the judicial selection (continued...)

We use the term "partisan involvement" advisedly. Although the Ninth Circuit's majority opinion states at one point that Section 6(b) "imposes a total ban on any gesture of support for or opposition to a candidate" (App. to Pet. A8), both that opinion and the concurrence repeatedly describe Section 6(b) as a "ban on partisan endorsements" and analyze its constitutionality accordingly. *See, e.g.*, App. to Pet. A10 ("the ban on partisan endorsements by political parties burdens political speech without being narrowly tailored to serve competing state interests"); *id.* at A21 ("the prohibition of endorsements appears to be counter-productive"). In fact, however, Section 6(b) is *not* limited to endorsements; instead, it provides that no political party or central committee shall "endorse, *support, or oppose* a candidate for non-partisan office." (Emphasis added). The ballot argument in favor of Proposition 49 reveals that

---

[2](...continued)
process will in fact lead to more partisan judicial decision-making. However, academic literature not cited by the Ninth Circuit indicates that this will occur. Thus, one leading scholar of judicial elections—(whose work was cited by the concurrence (*see* App. to Pet. A20 n.9)—has written:

> "[P]artisanship of the judicial selection system . . . has an impact upon judicial behavior. A partisan judicial selection system is more likely than a nonpartisan system both to [a] encourage the recruitment of party activists deeply committed to the policy and value orientations of their party and [b] provide judges with a partisan constituency whose policy preferences the judges must anticipate in their judicial decision-making if they are to realize renomination and re-election." (P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 162 (1980))

Even in the absence of definitive evidence on this issue, the California electorate was free to act on the basis of beliefs that are not "clearly wrong." *Gregg v. Georgia*, 428 U.S. 153, 184-87 (1976) (plurality opinion) (inconclusive debate as to whether capital punishment is a deterrent does not prevent legislature from determining that capital punishment is necessary in some cases); *accord Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (legislature may assume without scientific data that exposure to obscene material adversely effects individuals and society). Indeed, this Court has recognized that a legislative determination that a particular category of speech threatens the administration of justice "would weigh heavily in any challenge of the law as infringing constitutional limitations." *Bridges v. California*, 314 U.S. 252, 260 (1941); *accord Wood v. Georgia*, 370 U.S. 375, 385-86 (1962).

Section 6(b) was intended to prevent political parties from providing "money, help, and endorsements" in non-partisan races. California Ballot Pamphlet, June 3, 1986 Primary Election, at 26.[3] Thus, the issue before this Court is not whether California's voters were legitimately concerned that judicial independence might be compromised by partisan endorsements alone, but rather whether they reasonably perceived that partisan endorsements, organizational support, *and* monetary contributions would threaten public confidence in the impartiality of California's courts.[4]

The California electorate's belief that partisan involvement in judicial elections threatens judicial independence is eminently reasonable, and is based on both long-established tradition and historical fact. Immediately prior to the Progressive era, Lord Bryce argued that popular elections for judges "lower[ed] the character of the judiciary," due to the influence of political parties. 1 *American Commonwealth* 507 (3d ed. 1905).[5] Congress, too, has recognized that partisan political activities pose a particular threat to the impartial administration of the law; thus, the Hatch Act bars federal employees from engaging in partisan—but *not* non-partisan—political activities. *Compare* 5 U.S.C. §7324(a)(2) *with* 5 U.S.C. §7326; *see also*

---

[3]Thus, the ballot argument told the electorate that local office holders were "concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines." *Id.*

[4]Although this case arises from the refusal of San Francisco's Registrar of Voters to permit official party endorsements to be printed in the Voter's Pamphlet (*see* App. to Pet. A2), the District Court's judgment restrains enforcement of Section 6(b) in toto, rather than simply as applied to endorsements (App. to Pet. A118), and that judgment was affirmed by the Ninth Circuit. App. to Pet. A10. Because this Court reviews judgments, not opinions (*Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), it is of no moment that the Ninth Circuit's opinion focuses almost exclusively on Section 6(b)'s effect on endorsements.

[5]"Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance." (*Id.*)

Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 576 (1973).

Experience in other states has confirmed California's wisdom in seeking to keep political parties out of the judicial election process.[6] For example, following the "Greylord" scandal in Chicago, Illinois, the chief judge of the Circuit Court of Cook County created a Special Commission on the Administration of Justice in Cook County. The Commission's report includes a telling description of the evils of partisan judicial elections:

> "Where a position on the bench has been secured with the political, organizational, or financial assistance of party leaders, the judge 'enters upon his office under a load of political debt, and however high-minded he may be, he will find it almost impossible to resist completely the importunities of his creditors for payment through judicial favors—sometimes slight, sometimes not so slight.'" Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection*, 4 (1985))[7]

Cook County's experience is typical. In 1988, a report of the New York State Commission on Government Integrity reached similar conclusions after a study of judicial elections in that State. In concluding that "the conflict between party politics . . . and judicial independence and non-partisanship . . . is inherent in the partisan nature of party activity and political elections," the Commission stated:

---

[6]The concurrence criticizes San Francisco for failing to proffer evidence concerning the effects of partisan endorsements in California. App. to Pet. A-15 n.5. But California did not have to look only to its own experience in deciding to adopt Section 6(b). *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51 (1986) (city could rely on experience of other cities in adopting adult theater zoning ordinance).

[7]A copy of this Report was lodged with the Clerk concurrently with the brief amicus filed in support of the petition for certiorari.

"While party control may be appropriate in the case of election to offices within the legislative or executive branches, in the case of judicial elections, such control undermines the moral foundation of the judiciary by threatening its independence and non-partisanship." (State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 4 (1988))

• • • •

"As our investigation shows, political parties are geared to reward loyalty, not merit; to discourage, not encourage independence and diversity; and to obtain power rather than promote justice. Such goals, however valuable to the operation of the party system in general, have no place in the selection of our judges." (*Id.* at 44-45)[8]

The belief of California's voters that partisanship and judicial independence are mutually incompatible is supported by logic, as well as experience. As Justice Scalia recently stated, "partisanship [in a judge] is not only unneeded but positively undesirable." *Rutan v. Republican Party of Illinois*, -- U.S. --, 58 U.S.L.W. 4872 (1990) (Scalia, J., with Rehnquist, C.J., & Kennedy, J., dissenting). That is so for two separate, but related, reasons. First, judges may not be partisans because they must decide cases on their merits, and not on the basis of extraneous considerations based on political benefit or personal policy preferences. *See Chevron v. Natural Resources Defense Council*, 467 U.S. at 866. Second, because members of the "political" branches of government—unlike judges—*can* make decisions based on partisan considerations (*id.*),

[8]A copy of this Report was lodged with the Clerk concurrently with the brief amicus filed in support of the petition for certiorari.

judicial partisanship lessens the distinction between the Judiciary and the Legislative and Executive branches of Government, and thus impairs the Judiciary's legitimacy. *Cf. Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (Because this Court possesses "neither the purse nor the sword," its authority "ultimately rests on sustained public confidence in its moral sanction," confidence that "must be nourished by . . . complete detachment, in fact and in appearance, from political entanglements . . . ."). For this reason, as the Court recently stated, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality *and* nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

California's voters thus had good reason to believe that the legitimacy of the State's judiciary—and its "reputation for impartiality and nonpartisanship"—would be weakened by permitting partisan "money, help, and endorsements" in judicial elections. Even in the unlikely event that no judge ever takes account of "political debt" in deciding a case, partisanship inevitably compromises the appearance of justice because it impairs the independence of the judiciary from the "political" branches. Freedom from partisanship—from "political entanglements"—is what separates the Judicial Branch from the rest of government. Once California's judges are labelled as partisan, nonpartisan judicial races will be distinguishable in name only from elections for Governor and members of the Legislature. But because judicial independence is founded upon nonpartisanship, judges identified in the consciousness of the electorate as "Democratic" or "Republican" will inevitably appear less independent of the "political" branches, less "legitimate," and less fair.[9]

[9]One need not be a Cassandra to believe that permitting partisan support in judicial elections will inevitably lead to judges and courts being tarred with partisan labels. In 1982, for example, one television commercial in Ohio told the voters that the "Democratic Supreme Court" had saved the electorate $30 million in just one year "by saying no to utility rate hikes," and urged voters to "keep the people's court

(continued...)

Section 6(b) thus serves California's compelling interest in promoting public confidence in the impartiality and nonpartisanship of its judiciary. We turn now to examine whether the provision is "narrowly tailored" to serve that interest.

III.

SECTION 6(b) IS NARROWLY TAILORED TO SERVE THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

In holding that Section 6(b) is not "narrowly tailored" to serve the interests identified by San Francisco, the Ninth Circuit's majority opinion and the concurrence criticized the provision on several grounds. First, the concurrence found that Section 6(b) did not serve the State's interest in "maintaining judicial independence" because "the dependence of judges on campaign contributions represents a far greater threat to the integrity of California's judiciary than the possibility that some judicial candidates may be endorsed by political party organizations." App. to Pet. A20. Second, the concurrence held that California may not constitutionally distinguish between political parties and other entities wishing to support or oppose candidates for judicial election. App. to Pet. A22. Third, the majority opinion upheld the District Court's finding that the "State could adequately safeguard the interests §6(b) was designed to protect by less drastic means, including provision for non-partisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates." App. to Pet. A8. As we shall now show, the first of these criticisms ignores recent changes in California law, as well as the critical differences between campaign contributions and

---

[9](...continued)
Democratic." Schotland, *Elective Judges' Campaign Financing*, 2 J. L. & POL. 57, 66 (1985). Obviously, Republicans and others championing causes favored by the G.O.P. may have reason to doubt whether a court elected as a "Democratic Supreme Court" will treat them impartially.

partisan endorsements, while the latter two fail to account for the State's interest in promoting public confidence in an impartial and nonpartisan judiciary.

A. The Ninth Circuit's Opinions Ignore Recently Enacted Limits On Contributions To Judicial Candidates In California As Well As The Substantial Differences Between Partisan Political Activity And Campaign Contributions.

The concurrence errs in assuming that the California electorate is insensible to the threat posed to judicial independence "from massive political contributions." App. to Pet. A11. While the opinion focuses almost exclusively on the California Supreme Court judicial retention election of 1986 (App. to Pet. A18-A20), California law has changed significantly since that episode. In 1988, California's voters adopted Proposition 73, which imposes strict contribution limits. "Persons" are subject to an annual contribution limit per candidate of $1,000. Cal. Gov't Code §85301(a).[10] Political committee contributions are subject to a per candidate annual limit of $2,500. Cal. Gov't Code §85303(a).[11] A "broad-based political committee" is limited to annual contributions of up to $5,000 per candidate.[12] These limits apply to candidates for "elective office" (Cal. Gov't Code §§85301(a), 85303(a)), which includes judicial offices. Cal. Gov't Code §82023.[13] Thus,

---

[10]A "person" is defined to mean "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization." Cal. Gov't Code §85102(b).

[11]A "political committee" is defined as "a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates." Cal. Gov't Code §85102(c).

[12]A "broad-based political committee" is defined to mean "a committee of persons which has been in existence for more than six months, receives contributions from 100 or more persons, and acting in concert makes contributions to five or more candidates." Cal. Gov't Code §85102(d).

[13]A federal district court has recently restrained enforcement of (continued...)

even assuming *arguendo* that interest group contributions pose a greater threat to judicial independence than does partisan political activity, the concurrence is wrong to suggest that the California electorate has "address[ed] only the superficial evil [of partisan involvement in nonpartisan campaigns] and fail[ed] to consider the underlying problem [of campaign contributions]." App. to Pet. A12.[14]

Moreover, the concurrence fails to acknowledge that campaign contributions pose a qualitatively different and less severe threat to the appearance of justice than partisan electioneering. Not every campaign contribution threatens judicial impartiality, and the large contributions that do pose a problem can be eliminated, as California has sought to do.[15] Nor, of course, will every case—or even many cases—heard by a particular judge involve campaign contributors. And in the rare case where a contribution might reasonably cause an objective observer to question the impartiality of the judge, judicial recusal is an available—and, in some cases, perhaps a required—

---

[13](...continued)
Proposition 73's contribution limits, on the ground that imposing limits on an annual (fiscal year) basis is unfair to challengers. *Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 588-90 (E.D. Cal. 1990), *application for stay of enforcement pending appeal denied sub nom. Kopp v. Service Employees International Union*, – U.S. –, 59 U.S.L.W. 3307 (Oct. 12, 1990). However, that decision may be reversed on appeal. Moreover, since contribution limits *per se* are unquestionably constitutional (*Buckley v. Valeo*, 424 U.S. 1 (1976)), there is no reason to believe that California's voters would not replace the contribution limits found in Proposition 73 with constitutional ones, if necessary.

[14]The concurrence also errs in comparing campaign contributions to partisan endorsements. *See, e.g.*, App. to Pet. A20. As discussed above, Section 6(b) proscribes not only partisan endorsements, but contributions and other forms of tangible aid, as well.

[15]Cf. Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 489 (1988) (arguing that a rule limiting attorney contributions under penalty of recusal by the judge "will reduce these contributions to a fairly uniform size, so that no single contributor will stand apart from the rest as having been *the* major cause of the judge's accession to the bench. As a result, there is no individual to whom the judge owes a debt of gratitude sufficient to cause an objective appearance of bias") (emphasis in original).

remedy.[16] For these reasons, the ethical problems posed by campaign contributions in judicial elections are episodic, rather than systemic, and thus do not pose a clear and present danger to the public's confidence in judicial independence and nonpartisanship. Cf. *Mistretta v. United States*, 488 U.S. at 407 (while "problem of individual bias is usually cured by recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judicial entanglement in the making of policy").[17]

B. Section 6(b) Is Not Underinclusive Because It Addresses Only Political Parties, And Not Other Interest Groups That Participate In Judicial Campaigns.

The concurrence's conclusion that California may not permissibly differentiate between political parties and other groups that participate in judicial elections ignores the State's appearance in promoting judicial independence and nonpartisanship. As long as contributions are limited,

---

[16]The ABA Code of Judicial Conduct, adopted in 1972, required judges to disqualify themselves in any proceeding where "their impartiality might reasonably be questioned . . . ." The new ABA Model Code of Judicial Conduct, adopted in 1990, contains identical language. §3E(1). Moreover, California law provides an additional safeguard against a judge deemed biased by an attorney or a litigant, since California permits either a litigant or a party to exercise one peremptory challenge in any case against any judge as of right, without any showing of cause other than the filing of a declaration stating that in the declarant's opinion, the judge is biased. Code Civ. Proc. §170.6.

[17]Indeed, the electorate's differing treatment of campaign contributions and partisan political activity in the context of judicial elections in and of itself demonstrates that the latter, but not the former, threatens the appearance of justice. While the electorate has attempted to ban partisan "money, help, and endorsements" by enacting Section 6(b), campaign contributions have been limited, rather than eliminated. The electorate has also adopted an election system which bans public financing (Cal. Gov't Code §85300), and thus requires candidates to seek private sources of funding for their campaigns. Plainly, the electorate does not agree with the concurrence that campaign contributions per se pose a greater threat to impartial and nonpartisan justice than partisan political activity. Because the State's interest in promoting the appearance of justice is based on the need to preserve public confidence in the impartiality of its courts (*see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 864-65), it is the electorate's opinion, rather than that of the concurrence, that should be dispositive.

and judges disqualify themselves in appropriate cases involving campaign contributors or opponents, political activity in judicial elections by special interest groups and newspapers (such as those mentioned in the concurring opinion at A22) do not threaten judicial independence. When contributions or endorsements come from political parties, however, a new and different factor enters the equation. As we have seen, the independence of the judiciary is not limited to the idea that judges must decide cases on their merits, free from extraneous "political" considerations. Instead, it is also based on maintaining the distinction between the Judiciary and the other, "political" branches of government. *See* pp.10-11, *supra*.

Partisan involvement in judicial elections thus threatens judicial independence in a way that non-partisan activity does not. Partisan activity in judicial elections links the judiciary to political partisans in the legislative and the executive branches. But no such linkage occurs as the result of involvement in judicial elections by other interest groups.[18]

Here, too, logic is confirmed by experience. As Judge Alarcon's dissent below demonstrates, California's nonpartisan judicial election system came into existence as a response to entrenched partisan corruption. *See* pp.4-5, *supra*. There is no corresponding history of corruption instigated by pressure groups such as those identified in the concurring opinion. In the absence of such a history, California need not apply rules intended to disassociate political parties from their Tammany Hall heritage to interest groups such as the National Organization for

[18]This linkage has a direct impact on judicial independence. Much of what courts do involves passing on the activities of the other branches of government. Thus, when a court rules upon the constitutionality of a statute, or reviews an administrative decision, or decides a criminal case brought by a district attorney, it necessarily reviews the legality of decisions made either by elected officials or those subordinate to and carrying out the policies of such officials. If, however, judges are subject to the same partisan forces as other elected officials, the electorate may perceive that such review will not be truly independent.

Women, the National Right to Life Committee, or the Sierra Club.

C. There Are No Less Drastic Alternatives To Section 6(b) That Would Serve As Effectively The State's Interest In Promoting Public Confidence In The Impartiality And Nonpartisanship Of Its Judiciary.

In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion held that the State's interest in promoting impartial administration and freeing nonpartisan office holders from partisan pressures could be achieved by the State's nonpartisan election statutes without banning partisan political activity. App. to Pet. A8 & n.4. If the State's interest is defined as promoting the appearance of justice, however, these statutes became irrelevant.

We have seen above that California has a strong interest in preventing its judges from being identified as political partisans. *See* Part II, *supra*. Prohibiting partisan "money, help, and endorsements" furthers that interest precisely. Even if the mechanics of nomination and voting remain formally nonpartisan, judicial candidates who are identified in billboards, bumper strips, newspaper advertisements, and television and radio commercials as candidates of a political party will inevitably be seen as partisan judges. Consequently, contrary to the Ninth Circuit's opinion, formal nonpartisanship is not enough. Section 6(b) is therefore "narrowly tailored" to further the State's interest in promoting judicial independence and nonpartisanship.[19]

[19]In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion relied heavily on the "fact" that California managed to have nonpartisan government for seventy years "without benefit of a formal ban on partisan advocacy . . . ." App. to Pet. A8 & n.4. During all but the last two years of that period, however, it was unclear whether California law in fact prohibited partisan involvement in nonpartisan elections. *Compare Unger v. Superior Court*, 102 Cal. App. 3d 681 (1980), *cert. denied*,, 449 U.S. 1131 (1981) (holding that California law prohibited such involvement) *with Unger v. Superior Court*, 37 Cal. 3d 612 (1984) (holding to the contrary). Indeed, the majority opinion

(continued...)

CONCLUSION

The Ninth Circuit's judgment should be reversed, and Section 6(b) upheld as constitutional.

DATED: February 28, 1991.

Respectfully,

JEROME B. FALK, JR.
STEVEN L. MAYER*
ANNETTE L. HURST
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK
A Professional Corporation

*Counsel of Record
Attorneys for Amicus Curiae

---

[19](...continued)
itself admits that "because the legal status of [partisan] endorsements was unclear, political parties did not endorse candidates in 75% of California counties." App. to Pet. A1. Moreover, there is no evidence that political parties and party central committees were extensively involved in nonpartisan judicial elections during this period. *See* App. to Pet. A36 n.20 (concluding that the 1960 study relied on by the concurring opinion was unclear as to the extent of partisan involvement in judicial races). At most, the evidence suggests that three county central committees endorsed judges in the years prior to the first *Unger* decision. *See Unger v. Superior Court*, 102 Cal. App. 3d at 684-85 n.4.

Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

(10)

No. 90-769

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,
Petitioners,

v.

BOB GEARY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND ITS CALIFORNIA AFFILIATES, *AMICI CURIAE,* IN SUPPORT OF RESPONDENTS

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

KARL OLSON*
ERIN DALY
COOPER, WHITE & COOPER
201 California Street
17th Floor
San Francisco, CA 94111
(415) 433-1900

ALAN L. SCHLOSSER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street
San Francisco, CA 94103
(415) 621-2493

* Counsel of Record

Attorneys for Amici Curiae
Additional Counsel on Inside Front Cover

PAUL HOFFMAN
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

BETTY WHEELER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SAN DIEGO
AND IMPERIAL COUNTIES
1202 Kettner Boulevard
Suite 6200
San Diego, CA 92101
(619) 232-2532

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ARTICLE II, SECTION 6(b) IS A CLEAR INFRINGEMENT ON THE FREE SPEECH AND FREE ASSOCIATION RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS 7

A. SECTION 6(b) SERVES NO COMPELLING STATE INTEREST. 8

B. SECTION 6(b) IS NOT NARROWLY TAILORED TO ANY COMPELLING GOVERNMENTAL INTEREST 14

II. SECTION 6(b) IS UNNECESSARY TO PRESERVE THE INDEPENDENCE OF THE CALIFORNIA JUDICIARY 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

American Civil Liberties Union v. *Jennings*,
366 F.Supp. 1041 (D.D.C. 1973) 2

Bates v. *State Bar of Arizona*,
433 U.S. 350 (1977) 21, 22

Board of Education v. *Pico*,
457 U.S. 853 (1982) 8

Bridges v. *California*,
314 U.S. 252 (1941) 13, 19

Buckley v. *Valeo*,
424 U.S. 1 (1976) 1, 2, 14

California Medical Association v.
Federal Election Commission,
453 U.S. 182 (1981) 2

Central Hudson Gas v. *Public Service Comm'n.*,
447 U.S. 557 (1980) 22

Common Cause v. *Schmitt*,
455 U.S. 129 (1982) 2

Eu v. *San Francisco Democratic Central Committee*,
489 U.S. 214 (1989) . . . . . *passim*

Federal Election Commission v.
Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 2

Federal Election Commission v.
National Conservative Political Action Committee,
470 U.S. 480 (1985) 2

First National Bank of Boston v. *Bellotti*,
435 U.S. 765 (1978) 9, 14, 21

Geary v. *Renne*,
911 F.2d 280 (9th Cir. 1990) . . . . . *passim*

Lungren v. *Deukmejian*,
45 Cal.3d 727 (1988) 20

Meyer v. *Grant*,
486 U.S. 414 (1988) 2

Michigan v. *Butler*,
352 U.S. 380 (1957) 23

Mosk v. *Superior Court*,
25 Cal. 3d 474 (1979) 23

Nebraska Press Assn. v. *Stuart*,
427 U.S. 539 (1976) 7

New York Times v. *Sullivan*,
376 U.S. 254 (1964) 19

Schneider v. *Irvington*,
308 U.S. 147 (1939) 15

Staats v. *American Civil Liberties Union*,
422 U.S. 1030 (1975) 2

Tashjian v. *Republican Party of Connecticut*,
479 U.S. 208 (1986) 7

Unger v. *Superior Court*,
37 Cal.3d 612 (1984) 3

United States v. *Grace*,
461 U.S. 171 (1983) 17, 22

United States v. *Nixon*,
418 U.S. 683 (1974) 20

Virginia Pharmacy Board v. *Virginia Consumer Council*,
425 U.S. 748 (1976) 9, 12, 13, 21, 22

Whitney v. *California*,
274 U.S. 357 (1927) 9, 18

Zauderer v. *Office of Disciplinary Counsel*,
471 U.S. 626 (1985) 15

Statutes and Constitutional Provisions

United States Constitution
First Amendment . . . . . *passim*

California Constitution, Article II, §6(a) 3, 6, 14

California Constitution, Article II, §6(b) . . . . . *passim*

California Code of Civil Procedure §170 23

Other Authorities

Epstein, *Political Parties in the American Mold*
(University of Wisconsin Press, 1986) 9, 12

Thomas Jefferson's First Inaugural Address
Modern Eloquence (W.A. Cowie, 1901) 8

Mayhew, *Placing Parties in American Politics*
(Princeton University Press, 1986) 10

Mills, *A Disorderly House*
(Heyday Books 1987) 15

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AND ITS CALIFORNIA AFFILIATES *AMICI CURIAE,* IN SUPPORT OF RESPONDENTS

The American Civil Liberties Union ("ACLU") and its California affiliates submit this brief as *amici curiae* in support of the judgment of the United States Court of Appeals for the Ninth Circuit, sitting *en banc,* holding that article II, section 6(b) of the California Constitution violates the First Amendment.

Letters from counsel for each of the parties, consenting to the filing of this brief, have been filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a non-profit, membership corporation with over 275,000 members throughout the United States. For over 70 years, the ACLU has dedicated itself to upholding and protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations. The ACLU Foundation of Northern California, the ACLU Foundation of Southern California, and the ACLU Foundation of San Diego and Imperial Counties are the affiliates of the ACLU in California.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of election campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election

laws. The ACLU has participated as *amicus curiae* in *California Medical Association* v. *Federal Election Commission,* 453 U.S. 182 (1981); *Common Cause* v. *Schmitt,* 455 U.S. 129 (1982); *Federal Election Commission* v. *National Conservative Political Action Committee,* 470 U.S. 480 (1985); *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *Meyer* v. *Grant,* 486 U.S. 414 (1988), and other cases raising issues similar to those presented here.

In addition, the ACLU has represented various groups and individuals, of all ideological points of view, whose political advocacy has been prohibited, restricted or inhibited by state election laws. Furthermore, the ACLU has had to defend itself against the unconstitutional application of election laws to its non-partisan activities. See *American Civil Liberties Union* v. *Jennings,* 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *American Civil Liberties Union,* 422 U.S. 1030 (1975); *Buckley* v. *Valeo,* 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976).

Because the ACLU is not a political party, its interest here is not to assert its own free speech rights. Rather, the ACLU seeks to ensure that the five political parties that are qualified in California[1] are not deprived of their right to communicate with their members and with the general public on issues that lie at the core of the First Amendment. The ACLU also seeks to vindicate the rights of its members and of the general public to hear what the parties have to say about candidates for public office.

---

[1] These parties are the Republican, the Democratic, the Libertarian, the Peace and Freedom, and the American Independent Party. See Brief for Petitioners at 9 fn. 2 and statutes cited therein.

STATEMENT OF THE CASE

Article II, section 6(b) of the California Constitution, which became effective in June 1986, bans political party endorsements, support or opposition in "nonpartisan" (local and judicial) elections. Respondents, registered voters and members of both Democratic and Republican party committees in San Francisco, sought to have the City and County of San Francisco and the San Francisco Registrar of Voters print official political party and party central committee endorsements in the San Francisco Voters Pamphlets prepared for the elections scheduled for June 2 and November 3, 1987. Joint Appendix (hereafter "JA") at 4-6. When their request was denied, respondents filed this suit challenging the constitutional validity of section 6(b). JA at 2-7.

In April 1988, the District Court found that section 6(b) violated the First and Fourteenth Amendments to the United States Constitution and granted respondents' prayer for injunctive and declaratory relief. JA at 24. The District Court relied on Justice Grodin's concurrence in the California Supreme Court decision in *Unger* v. *Superior Court,* 37 Cal.3d 612 (1984)[2]. JA at 41. (*Unger* found that political parties were not then prohibited from endorsing nonpartisan candidates; Justice Grodin concluded that such a ban would be unconstitutional.) Petitioners appealed and a panel of the Ninth Circuit reversed the District Court, finding that although section 6(b) infringed upon First Amendment rights, it was

---

[2] The *Unger* case construed what is now article II, section 6(a) of the California Constitution, which establishes that "All judicial, school, county, and city offices shall be nonpartisan." Hereinafter, it will be referred to as section 6(a).

narrowly tailored to the compelling state interest of impartially administered government. Appendix to Petition for Certiorari (hereinafter "Pet. App.") at A-67.

In 1990, the Ninth Circuit reconsidered the case *en banc* and affirmed the decision of the District Court finding section 6(b) unconstitutional. Pet. App. at A-1. This petition followed.

SUMMARY OF ARGUMENT

Article II, section 6(b) of the California Constitution is a clear infringement of the First Amendment. Political parties have a right to make known their views on public issues and candidates for public office, and the electorate has a right to hear those views. This Court recognized only two years ago in *Eu* v. *San Francisco Democratic Central Committee,* 489 U.S. 214, 223 (1989), that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." (Citation omitted.) The Court branded a similar ban on endorsements by parties in primary elections "particularly egregious." *Id.* at 224.

None of the interests advanced by petitioners to support section 6(b)'s Draconian ban on speech are compelling. Petitioners have advanced no recent or realistic threat that parties will dominate local and judicial elections. Recent history, in fact, suggests the contrary. Even if there were some chance that parties could exert a major influence in non-partisan elections, a paternalistic desire to protect the public from its own supposed impressionability does not justify a prohibition on speech.

Likewise, no compelling interest is served by singling out political party endorsements while leaving all other forms

of endorsements untouched. Party affiliation in California has actually decreased over the past few decades. At the same time, the influence of other political organizations—such as political action committees representing trial lawyers, insurance companies, and environmental groups, all of which are left untouched by section 6(b)—has increased many times over. Section 6(b) is thus both overinclusive, for singling out political parties without a showing that they pose any clear and present danger to the electoral process, and underinclusive for leaving untouched many far more powerful forms of influence. Indeed, section 6(b) would even allow party "clubs"—of which the record shows there are many in San Francisco—to flourish in non-partisan elections, while stifling official party committees and the parties themselves.

Petitioners have also failed to show that section 6(b) is necessary to serve the independence of the judiciary. Judges have consistently shown the ability to remain free of partisan influences and to vote against their "benefactors." Judges have been independent from such pressures in California. They can and will remain so regardless of whether political parties are allowed to endorse or oppose them.

There is no record evidence supporting the dire warnings raised by petitioners. To the extent there is any evidence on the point, it supports respondents and not petitioners. Despite the absence of any explicit ban on party endorsements in judicial elections until 1986, the parties have played no significant role in any California judicial elections this century. In 1986, however—the first judicial election in which .there *was* a clear ban on party activity—California witnessed its most heated and controversial judicial election in history, and for the first time incumbent justices were not confirmed. This election was followed by a very quiet 1990

election in which—despite the fact that parties were allowed to endorse by virtue of the Ninth Circuit's *en banc* decision in this case—parties played no real role.

A judge is unlikely to be perceived as ideological merely because a party endorses or opposes him or her. Parties are diverse collections of people generally embracing a wide spectrum of views. The perception of impropriety, if not impropriety itself, is far more likely to arise with support or opposition from special interest groups or economic entities.

Finally, section 6(b) is manifestly not the least restrictive way of keeping the judiciary independent. Any number of other alternatives—tougher recusal standards, lifetime tenure, or changing the present system of elected judges, for instance—can address the perceived problem without prohibiting political speech. Moreover, California has failed to show that its provisions for peremptory disqualification of trial judges, pro tempore appellate judges, and section 6(a) itself, providing for nonpartisan elections, are inadequate ways to keep the judiciary independent and impartial.

ARGUMENT

This case is about pure political speech, and a state's paternalistic attempt to muzzle it. At stake is whether voters have a right to hear what political parties and their members have to say about local government and the judiciary. Here—as in the cognate case of *Eu* v. *San Francisco Democratic Committee,* 489 U.S. 214, 228 (1989)—the state seeks to squelch speech with naught but its own claim to know best how to help its citizens make wise decisions. The same interests are at stake, and the same unsupported justifications

are advanced to silence speech, as in *Eu.* This Court should reach the same result and affirm the Ninth Circuit's *en banc* decision.

I. ARTICLE II, SECTION 6(b) IS A CLEAR INFRINGEMENT ON THE FREE SPEECH AND FREE ASSOCIATION RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS.

There is no question that article II, section 6(b) infringes on First Amendment rights. As the Court observed only two years ago: "A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu,* 489 U.S. at 222, citing *Tashjian* v. *Republican Party of Connecticut,* 479 U.S. 208, 217 (1986).

By depriving political parties of their right to make endorsements, section 6(b) not only limits but "suffocates" their rights of free speech and association. *Eu,* 489 U.S. at 224. The blanket prohibition on speech contained in section 6(b) is thus a classic prior restraint—"the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 559 (1976).

Given section 6(b)'s clear infringement on First Amendment rights, it can be justified only if it serves a compelling state interest and is narrowly tailored to serve that interest. *Eu,* 489 U.S. at 222. Section 6(b) fails both tests.

A. SECTION 6(b) SERVES NO COMPELLING STATE INTEREST.

The driving force behind section 6(b)—indeed, the only interest advanced to support it—is pure paternalism. Here, as in *Eu,* "The State's...justification for the ban on party endorsements and statements of opposition is that it is necessary to protect...voters from confusion and undue influence." *Eu,* 489 U.S. at 228.

Such claims are nothing new. Almost 200 years ago, Thomas Jefferson confronted and rejected similar arguments in his first inaugural address: "Sometimes it is said that man cannot be trusted with the government of himself. Can, then, he be trusted with the government of others? or have we found angels in the form of kings to govern him? Let history answer this question."[3] James Madison has also eloquently emphasized the preeminent importance of the public's right to know: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (Quoted in *Board of Education* v. *Pico,* 457 U.S. 853, 867 (1982) (plurality opinion).)

This Court has consistently greeted unsupported attempts to protect voters from themselves with the skepticism they deserve. "[A] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."

---

[3] Thomas Jefferson's First Inaugural Address, March 4, 1801, reprinted in *Modern Eloquence* (W.A. Cowie, 1901) at 1257.

Eu, 489 U.S. at 228 (citations omitted).[4]

The state does not deny the paternalistic impulse behind section 6(b); rather it attempts to justify that paternalism by relying on the excesses of early twentieth-century bossism. There are at least two problems with this approach. First, our constitutional system does not accept the equation between speech and corruption. E.g. *Whitney* v. *California,* 274 U.S. 357 (1927) (Brandeis, J., concurring). Second, it ignores petitioners' concession that the political parties in California are weak, and have "traditionally been weak." Brief for Petitioners at 28, citing the former chair of the California Democratic Party, Edmund G. Brown, Jr.'s view that "[f]or the better part of this century, political parties in California have been rendered impotent." *Id.,* fn. 12. Indeed, the percentage of voters affiliated with the two major parties in California has consistently declined over the past 30 years. See Appendix A hereto. In the same period, a greater percentage of voters in the State have declined to state their party affiliation. *Ibid.* See also Epstein, *Political Parties in the American Mold* (University of Wisconsin Press, 1986) at 247-8. In turn, special interest groups—such as powerful business entities and labor unions, environmental groups and others—have exerted increasing influence in elections. There is thus nothing in the record to support the claim that political parties in California are likely to present a great or imminent danger to the public interest. *First National Bank of Boston* v.

---

[4] "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 770 (1976).

Bellotti, 435 U.S. 765, 792 (1978).[5]

The most powerful demonstration that parties play an insignificant role in nonpartisan and judicial elections has come in the last two judicial confirmation elections. In November 1986—immediately after the voters adopted Proposition 49, and with the ban on party endorsements and support securely in place—supporters and opponents of three California Supreme Court justices spent a record $11 million-plus in the most heated judicial election in the state's history. For the first time ever, three incumbent justices were defeated. *Geary* v. *Renne* (Reinhardt, J., concurring), Pet. App. at A-19. In 1990—when, as a result of the Ninth Circuit's *en banc* decision in this case, the parties were free to endorse or oppose candidates as they saw fit—little or no attention was paid to the judicial election and the incumbents breezed to confirmation with little or no visible support or opposition from the parties. To be sure, other factors may have played key roles in the clamorous 1986 confirmation fight and the

---

[5] In San Francisco, for instance, party structure is "'only a thing of paper. There is no cadre of precinct workers except that provided by each candidate, and the candidate also does his own fund raising. There is a [Democratic] central committee, but no one seems to know why its control is important.' The upshot: 'In this context of invisible parties an election is much like the start of those long-distance races where everybody is on his own, eyes straight ahead, and there's a considerable amount of jostling in the pack. Candidates raise their own funds, rarely coalesce with other candidates in a slate, and strive earnestly to reach across party and ethnic lines. With a number of candidates for all offices, running at large with no runoffs (except for mayor, beginning in 1975), the process is symbolized by the local practice of slapping hundreds of election posters on buildings, fences, and poles all over the city. By election day the city is a kaleidoscope of jarring, confusing, and possibly self-defeating posters.'" Mayhew, *Placing Parties in American Politics* (Princeton University Press, 1986) at 187.

quiet 1990 election. But these examples indicate that petitioners' interest in keeping the parties out of local politics was more compelling in 1911 than in 1991—and is hardly compelling enough now to justify such a broad prohibition on speech. *See Geary* v. *Renne* (Reinhardt, J., concurring), Pet. App. at A-11 ["whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties -- or even from the Libertarians -- but rather from the corrupting influence of money in politics"].

In short, as this Court recognized in *Eu,* "The State makes no showing...that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union." 489 U.S. at 228 fn. 18. Voters exercise their own independent judgment. *Ibid.* They have a right to know what various political parties think about candidates for local offices—and they usually have a healthy inclination to ignore the parties and make up their own minds when the curtain closes on the voting booth.[6]

---

[6] As this Court observed in *Eu,* party endorsements often exert an undue *lack* of influence on the voters. There are numerous examples of party-endorsed candidates losing in primary elections. *Eu,* 489 U.S. at 228 fn. 18. The trend continued in California in 1990 when the party organizations, freed by the *Eu* decision to endorse in primary elections, picked candidates who lost by substantial margins. *Geary* (Reinhardt, J., concurring), Pet. App. at A-15. As Judge Reinhardt observes, parties who cannot pick a winner in their own primaries are likely to have even less influence in non-partisan races—particularly in local elections where the party central committees, notoriously non-influential bodies, make the endorsements. *Ibid.* Indeed, one need look no further than the parties in

Even if the voters of California were at risk of being affected by partisan speech, this Court's precedents have unswervingly rejected a government's interest in selecting the appropriate voices for voters to hear. "[L]imiting what people may hear is generally suspect, but it is particularly egregious where the State censors the political speech a political party shares with its members." *Eu,* 489 U.S. at 223-4 (citations omitted). Indeed, the Court has consistently declined to use restrictions on speech to protect the intended audience from information, even in the context of commercial speech which lies much farther from the core of the First Amendment than the pure political speech at stake here.[7]

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.... What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.

Virginia Pharmacy Board, 425 U.S. at 770 and 773.

The Court's answer to that question has been clear and unequivocal, especially in the context of electoral politics. Limiting speech because it has the *potential* to be effective is not a compelling interest.[8]

> [T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution protects expression which is eloquent no less than that which is unconvincing. We noted only recently that the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. Moreover, the people in our democracy are entrusted with the

---

the present case to determine that allowing parties to endorse in non-partisan elections is likely to have little or no influence. Four of the plaintiffs are members of the San Francisco Republican County Central Committee. JA at 4. However, less than 20 percent of San Francisco's electorate are members of the Republican Party. Appendix B hereto. Furthermore, registering with a particular party is not necessarily tantamount to identifying with it. "In California in 1982, 88 percent of its registrants listed themselves as Republicans or Democrats but only 73 percent of its surveyed voters identified with the major parties, [suggesting that] some voters officially record a party preference that they do not really hold." Epstein, *Political Parties in the American Mold,* at 246.

[7] In *Virginia Pharmacy,* 425 U.S. at 769-770, this Court dismissed the Pharmacy Board's contentions that "unwitting customers" exposed to price information would "choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business.... They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what."

[8] "In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." *Bridges v. California,* 314 U.S. 252, 273 (1941).

> responsibility for judging and evaluating the relative merits of conflicting arguments.

Bellotti, 435 U.S. at 790-791, citing *Buckley v. Valeo,* 424 U.S. 1 (1976) (internal quotations and other citations omitted). Section 6(b) is fundamentally incompatible with that constitutional tradition.

B. SECTION 6(b) IS NOT NARROWLY TAILORED TO ANY COMPELLING GOVERNMENTAL INTEREST.

Petitioners repeatedly assert that their objective is to "keep judicial, school and local elections nonpartisan." Brief for Petitioners at 31. *See also* Brief for Petitioners at 5, 12. Their argument is fatally flawed for two reasons. First, the goal of nonpartisanship is already assured by section 6(a) of the California Constitution. *See* n.2, *supra.* Indeed, until 1986, California itself apparently did not believe that an explicit ban on party endorsements was necessary to ensure the nonpartisan character of "judicial, school and local elections." At the very least, petitioners must now carry the burden of showing some empirical basis for their change of heart. As indicated earlier, that burden has clearly not been met on this record.

Second, the ban on party endorsements embodied in section 6(b) is both overinclusive and underinclusive. It is overinclusive because it is surely unreasonable to contend that all or even many officials will abandon their sense of the public interest in order to curry favor with the parties that endorse

them in nonpartisan elections.[9] Yet, without such a fit between means and ends, section 6(b) cannot be sustained. As this Court has repeatedly emphasized, "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 646 (1985). *A fortiori,* would-be regulators must bear a heavier burden when they seek to restrict core political speech.

In this case, there is no claim that a party endorsement is harmful in itself. Rather, it is said that party endorsements are likely to foster an environment in which a judge's vote or mayor's order reflects his or her party's view.[10] Under our constitutional system, however, the speculation that some candidates for nonpartisan elected office will abuse the potential for professional or pecuniary gain from party patronage is an unacceptable basis for regulating speech. Like prohibiting handbilling in order to prevent littering, banning political speech in order to reduce the opportunity for bossism is inconsistent with the First Amendment. *See Schneider* v. *Irvington,* 308 U.S. 147, 162 (1939) (state can achieve its goal

---

[9] Even the most partisan of officeholders recognize that they should not trade favors for support. See Mills, *A Disorderly House* (Heyday Books 1987) at 1, quoting Jesse Unruh, the late Speaker of the California Assembly.

[10] "Local government's capacity to address those problems depends upon its ability to attract to public office independent thinkers who are not willing to follow the party line just to be elected." Brief for Petitioners at 17. It goes without saying, by now, that petitioners have adduced no evidence indicating a paucity of independently thinking candidates.

of preventing littering by punishing "those who actually throw papers on the street" rather than adopting the broadbrush approach of banning hand-billing). Thus, section 6(b) is overinclusive.

Section 6(b) falters as well because it is underinclusive: it arbitrarily singles out political parties even though dozens of other political speakers could have the same (or more) effect on voters, candidates, and officeholders as the parties are purported to have. See Supplemental Declarations of Arlo Hale Smith and Terence Faulkner, JA at 17-23, observing that numerous *unofficial* "clubs" use party names and make endorsements. Everyone from the American Trial Lawyers Association to the Socialist Workers' Party to numerous unofficial Democratic and Republican "clubs" endorse, support, and oppose partisan as well as nonpartisan candidates.

Section 6(b) would not change this system. Some organizations use their party affiliation in their title, some do not. Some have more political clout than the national or county political parties and some have less. But like the five qualified political parties that are the subject of section 6(b)'s ban, all of these groups are "political" and all are inextricably involved with elections. Section 6(b) would only affect the most publicly accountable of these groups.

Petitioners assert that the "endorsed candidate receives the benefits of voters' lists, organized party support, slate mailings and other forms of assistance usually associated with partisan elections." Brief for Petitioners at 14. This may be true, but it is by no means limited to support by the "qualified" political parties. As Judges Reinhardt and Kozinski observe in their concurrence below, "[t]oday's judicial elections, for the trial courts at least, are marked by the widespread use

of pseudo-official mailers that contain endorsements of candidates for both partisan and nonpartisan office." Pet. App. at A-23. These unofficial slate mailers "sell space—that is, endorsements—to the highest bidder." *Id.* at A-24. They use the names of political parties and *appear* to be official party endorsements. A ban on official party endorsements would not reach the unofficial mailers, leaving those not officially associated with a party free to sell endorsements while cutting off endorsements by official party committees. It defies common sense to think that "independent local government, and [] impartial justice and [] the appearance of impartial justice" would emanate from a simple ban on endorsements by five parties of excessively varied popularity and political clout. Brief for Petitioners at 14.

The problem with section 6(b) is that it is a total ban[11] on endorsements by political parties but its narrowness allows anyone to circumvent its spirit (thereby misleading the public) by capitalizing on a party's name while not actually representing the views of that party.[12] If the state wishes to deter elected officials from growing accustomed to depending on the kindness of strangers, it will have to do something other than ban the endorsements of only one potential participant.

---

[11] "Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

[12] For instance, the California Democratic Council is not an official arm of the Democratic Party, while the California State Central Committee is. There is no reason to believe that one carries more weight than the other (since a voter may not know the official status of each) or that one is more likely to improperly influence or attempt to influence a public official.

Petitioners argue that allowing party endorsements will subject candidates to "'litmus tests' of their commitment to party platforms." Brief for Petitioners at 16. However, there is no evidence that (1) such tests inevitably issue from party endorsements, or (2) that litmus tests will not issue in the absence of party endorsements.[13] In any event, the state's anxiety about litmus tests is not a basis for banning party endorsements any more than it would justify a ban on political endorsements by special interest groups that are prominently identified in the public mind with a single issue. Here, as elsewhere in the First Amendment, the answer to speech "is more speech, not enforced silence." *See Whitney* v. *California,* 274 U.S. at 377 (Brandeis, J., concurring).

II. SECTION 6(b) IS UNNECESSARY TO PRESERVE THE INDEPENDENCE OF THE CALIFORNIA JUDICIARY.

The state's contention that section 6(b) is necessary to preserve an independent judiciary—an interest that the ACLU supports—is unpersuasive for an additional reason as well. It underestimates the integrity of judges just as it overestimates the influence of political parties. This Court has consistently, and correctly in our view, rested its First

[13] In California's 1986 judicial election—in which political parties were not allowed to endorse, thanks to Proposition 49—the State's Governor opposed three sitting justices, largely because of their perceived position on capital punishment. *Geary* (Reinhardt, J., concurring), Pet. App. at A-18. The Governor may or may not have imposed a litmus test, and one can debate the propriety of his position. The point is that section 6(b) does not stop prominent partisan officeholders from commenting on the fitness of nonpartisan officials and from influencing the outcome of elections.

Amendment decisions on precisely the opposite assumption. To do otherwise would be "to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise." *Bridges* v. *California,* 314 U.S. 252, 273 (1941). As Justice Brennan explained for the Court in *New York Times* v. *Sullivan:*

> Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains 'half-truths' and 'misinformation.' Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

New York Times v. *Sullivan,* 376 U.S. 254, 272-273 (citations and footnote omitted). If harsh criticism of elected officials and judges cannot be stifled, there is no reason to prohibit support.

Petitioners give far too much credit to political

parties' ability to influence judicial elections, and too little credit to judges' ability to avoid undue influence once on the bench. In fact, judges have consistently shown the ability to remain free of partisan influences and even to vote against the executive who put them on the bench. (See, e.g., *United States* v. *Nixon,* 418 U.S. 683 (1974) [unanimous court rejects President Nixon's claim of executive privilege and forces him to surrender Watergate tapes]; *Lungren* v. *Deukmejian,* 45 Cal.3d 727 (1988) [unanimous court, comprised of five members appointed by Governor Deukmejian, rules against governor's appointee to state post whose confirmation failed in one house of Democratic-controlled Legislature].)

If the judiciary in California were truly unable to dispense impartial justice after having to suffer the slings and arrows of electoral politics, petitioners should have been able to point to some actual instances of corruption—but they have not. *Geary* (Reinhardt, J., concurring), Pet. App. at A-15. And if the electoral system could not produce an impartial judiciary, the remedy would be to have appointive judges. Having provided for an elected judiciary, however, California is in no position to silence those who would participate in those elections. "The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties." *Geary* (Reinhardt, J., concurring), Pet. App. at A-25.

Petitioners have simply presented no evidence whatsoever that rampant bossism will enshroud the State should the Ninth Circuit's decision be affirmed. As this Court

held in a somewhat different context, "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." *Bellotti,* 435 U.S. at 789. Here, as in *Bellotti,* no evidence supports petitioners' parade of horribles.

Thus, the Court has viewed with skepticism the claim that a state's legitimate interest in promoting professional ethics can be achieved by a prophylactic ban on speech. Accordingly, the Court has consistently rejected petitioners' paternalistic reasoning both because the challenged regulations that infringe on the First Amendment do not actually achieve the asserted goals and because they violate the principal value of the First Amendment, which is to increase rather than restrain the flow of information.

> In both *Bates*[14] and *Virginia Pharmacy Board,* the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that '[t]he advertising ban does not directly affect professional standards one way or the other.' 425 U.S. at 769. In *Bates,* the Court overturned an advertising prohibition that was designed to protect the 'quality' of a lawyer's work. 'Restraints on advertising ...are an ineffective way of

[14] *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

deterring shoddy work.' 433 U.S. at 378.

Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 564-5 (1980).

As this Court has recognized, "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378.[15] Similarly, an officeholder who is susceptible to improper influences is unlikely to be redeemed by a ban on party endorsements. In either case, the First Amendment will not allow an abridgement of speech in order to protect a professional, or a politician, from temptation.

Likewise, speech cannot be prohibited to avoid the appearance of outside influence on the judicial process. In *United States* v. *Grace,* 461 U.S. 171, 183 (1983), the Court struck down a total ban on communicative conduct on the sidewalks surrounding the Supreme Court. The Court did not "discount the importance of this proffered purpose" of the ban -- to avoid the appearance that this Court is subject to outside influence -- but nevertheless held that a ban on sidewalk demonstrations outside the Court was not justified and violated the First Amendment. *Ibid.* The same result follows here—the proffered purpose of section 6(b), to avoid the "appearance" of improper outside influence, does not justify a complete ban on parties' political speech.

Lastly, section 6(b) cannot stand because there are

---

[15] See also *Virginia Pharmacy Board,* 425 U.S. at 769: "The advertising ban [affects professional standards] only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event."

alternatives—some currently in existence—which are far less restrictive of speech. If properly modified or designed, such provisions could more precisely target the perceived problems of undue influence on the judiciary by special interest groups. In particular, California has ample provisions for recusal and for substitution of judges by judges pro tempore, both at trial and appellate levels. These provisions can solve the problems of undue influence and the appearance of impropriety or bias.

For instance, the California Supreme Court has authority to act even if it is made up *entirely* of lower appellate court judges. See *Mosk* v. *Superior Court,* 25 Cal. 3d 474, 480 (1979) (court "composed of all assigned judges pro tempore" finding that it does have constitutional authority to act, ruling against Associate Justice Stanley Mosk on that question). Judges on that court commonly step down from cases in which their impartiality could be questioned.

Likewise, California Code of Civil Procedure section 170 requires trial court judges to disqualify themselves in certain instances, including where the judge has a financial interest in the subject matter of the proceeding or in a party to the proceeding. Cal. Code Civ. Proc. section 170.1(a)(3). Those who seek to diminish the possibility that a sitting judge will be influenced by improper considerations should focus their efforts on this section of the Code, and attack the problem directly, rather than on an unnecessarily expansive and indirect constitutional provision which deters political speech rather than promoting impartiality.

Such alternatives as these demonstrate that section 6(b) is "legislation not reasonably restricted to the evil with which it is said to deal." *Michigan* v. *Butler,* 352 U.S. 380, 383 (1957). It "burns down the house to roast the pig." *Ibid.* Section 6(b) simply fails to pass constitutional muster.

CONCLUSION

Section 6(b) works a complete ban on political party speech in important local and judicial elections, without serving a compelling state interest. It runs afoul of the First Amendment and of this Court's precedents, including the recent *Eu* decision. The judgment of the *en banc* court below should be affirmed.

DATED: April 3, 1991

COOPER, WHITE & COOPER
KARL OLSON
ERIN DALY

By _____
Karl Olson*

*Counsel of Record for Amicus Curiae

Appendix A

PERCENTAGE OF ELIGIBLE VOTERS IN CALIFORNIA

Year	Democrats	Republicans	Other
1922	13%	40%	10%
1930	13%	47%	4%
1940	57%	35%	4%
1950	47%	30%	4%
1960	45%	31%	3%
1970	39%	28%	4%
1972	44%	29%	6%
1974	41%	26%	5%
1976	40%	24%	6%
1978	39%	23%	6%
1980	39%	26%	9%
1982	38%	25%	9%
1984	41%	29%	9%
1986	37%	28%	8%
1988	37%	28%	8%
1990	35%	27%	8%

PERCENTAGE OF REGISTERED VOTERS IN CALIFORNIA

Year	Democrats	Republicans	Other
1922	21%	63%	16%
1930	20%	73%	7%
1940	60%	36%	4%
1950	58%	37%	5%
1960	58%	39%	3%
1970	55%	40%	5%
1972	56%	37%	7%
1974	57%	36%	7%
1976	57%	35%	8%
1978	57%	34%	9%
1980	53%	35%	12%
1982	53%	35%	12%
1984	52%	36%	11%
1986	51%	38%	11%
1988	50%	39%	11%
1990	50%	39%	11%

Source: "Comparative Voter Registration and Participation in Statewide General Elections—1910-1990" from the California Secretary of State, Elections Division.

NUMBER AND PERCENTAGE OF REGISTERED VOTERS IN SAN FRANCISCO

Party	Number	% of Total
Democrats	263,202	64.86%
Republicans	75,606	18.63%
Other:		
American Independent	4,208	1.04%
Peace & Freedom	2,980	.73%
Libertarian	2,009	.50%
Non-Partisan *	56,342	13.89%
Misc.	1,429	.35%
	405,766	100.00%

* Declined to state party

Source: San Francisco Registrar of Voters, 3/91

No. 90-769

Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, CITY ATTORNEY FOR THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,
vs.
BOB GEARY, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, *ET AL.*, IN SUPPORT OF RESPONDENTS

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 677-7000
* Counsel of Record

Counsel for Amici Curiae

CALIFORNIA DEMOCRATIC PARTY;
PHILLIP ANGELIDES,
Chair, California Democratic Party;
EDMUND G. BROWN, JR.,
Former Chair, California Democratic Party;
CALIFORNIA LIBERTARIAN PARTY;
[Other Amici listed on inside front cover]

CONTINUED LISTING OF AMICI

GAIL LIGHTFOOT, Chair, California Libertarian Party; SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; CAROLE MIGDEN, Chair, San Francisco County Democratic Central Committee and Member, San Francisco Board of Supervisors; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; SAM HARPER, Chair, San Francisco County Republican Central Committee; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ROBERT FARRAN, Chair, Los Angeles County Democratic Central Committee; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; LIZ FIGUEROA, Chair, Alameda County Democratic Central Committee; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; STEPHEN STAMM, Chair, Santa Clara County Democratic Central Committee; MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE; DAVID STRAND, Former Chair, Marin County Democratic Central Committee; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; RON ARRANTS, Chair, Solano County Democratic Central Committee; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; THOMAS ROMERO, Chair, Placer County Democratic Central Committee; CAROL SHERMAN, Mayor of Fairfax; WENDY BAKER, Councilwoman and Former Mayor of Fairfax; NANCY L. PARENT, Councilwoman and Former Mayor of Pittsburg; EDDIE SOUZA, Mayor of Santa Clara; LAWRENCE E. STONE, Councilman and Former Mayor of Sunnyvale; DENNIS ZANE, Councilman and Former Mayor of Santa Monica; LIBBY DENEBEIM, Member, San Francisco Board of Education; MARY KING, Member, Alameda County Board of Supervisors; NATIONAL COMMITTEE FOR PARTY RENEWAL; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; PROFESSOR EDMOND COSTANTINI; AND PROFESSOR EUGENE C. LEE.

TABLE OF CONTENTS

	Page
INTERESTS OF THE AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. SECTION 6(b) IS AN EGREGIOUS BURDEN ON FIRST AMENDMENT RIGHTS AND MUST BE SUBJECTED TO THE MOST EXACTING SCRUTINY	4
A. Section 6(b) Targets Political Speech, Which Lies at the Core of the First Amendment	4
B. Section 6(b) Is a Speaker- and Content-Based Restriction of Speech, and Thus Is Presumptively Invalid	6
C. Section 6(b) Imposes a Substantial Burden on Associational Rights of Party Members	7
II. SECTION 6(B) DOES NOT SERVE PETITIONERS' ASSERTED STATE INTERESTS	9
A. Petitioners Can Point to No Evidence Linking Political Party Endorsements to Corruption, the Loss of Impartial Government, or Any Other Evil	9
B. A Ban on What the Electorate Can Hear Does Not Serve Petitioners' Asserted Interests in Maintaining the Appearance of Impartiality and Public Confidence in Officeholders and Judges	12

TABLE OF CONTENTS

Page

C. Petitioners' Reliance on *Letter Carriers* Is Misplaced 14

III. PETITIONERS' ASSERTED INTEREST IN ENSURING THAT CALIFORNIA'S POLITICAL PARTIES DO NOT "DISPROPORTIONATELY INFLUENCE" NONPARTISAN ELECTIONS BY COMMUNICATING THEIR VIEWS TO THE ELECTORATE IS INVALID 17

A. A State Has No Interest in Restricting the First Amendment Activities of Voluntary Political Associations 17

B. Petitioners Have No Legal Support for the Proposition That "State Conferred Advantages" Justify Section 6(b)'s Foreclosure of Speech 18

C. Petitioners Can Prove No Nexus Between the "State Conferred Advantages" and the Political Parties' "Power" 18

IV. THE GUARANTEE CLAUSE DOES NOT PERMIT CALIFORNIA TO INFRINGE THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS 20

V. SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE PETITIONERS' ASSERTED INTEREST IN THE IMPARTIAL ADMINISTRATION OF GOVERNMENT 22

TABLE OF CONTENTS

Page

A. Less Restrictive Alternatives Are Available 22

B. Section 6(b)'s Targeting of Political Parties Is Fatally Underinclusive 23

VI. THE ASSERTED INTEREST IN PRESERVING THE IMPARTIALITY OF THE JUDICIARY DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page(s)
Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990)	17,18
Baker v. Carr, 369 U.S. 186 (1962)	21
Bates v. State Bar of Ariz., 433 U.S. 350 (1977)	12,13
Boos v. Barry, 485 U.S. 312 (1988)	12,13
Bridges v. California, 314 U.S. 252 (1941)	27,28
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	15,16
Brown v. Hartlage, 456 U.S. 45 (1982)	6
Buckley v. Valeo, 424 U.S. 1 (1976)	4,15,16
Butterworth v. Smith, 110 S. Ct. 1376 (1990)	11
Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973)	14,15
Clark v. Burleigh, No. H007141, 1991 Cal. App. LEXIS 301 (6th App. Dist. Mar. 28, 1991)	25
Concerned Democrats v. Reno, 458 F. Supp. 60 (S.D. Fla. 1978)	11
Consolidated Edison Co. v Public Serv. Comm'n, 447 U.S. 530 (1980)	6
Elrod v. Burns, 427 U.S. 347 (1976)	16
Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989)	*passim*
FCC v. League of Women Voters, 468 U.S. 364 (1984)	19

TABLE OF AUTHORITIES

	Page(s)
FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)	17,18
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)	6,8,14
Florida Star v. B.J.F., 109 S. Ct. 2603 (1989)	24
Geary v. Renne, 911 F.2d 280 (9th Cir. 1990), *cert. granted* (1991)	*passim*
Geary v. Renne, 880 F.2d 1062 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990)	7,11
Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979)	15
Houston v. Hill, 482 U.S. 451 (1987)	27
Kusper v. Pontikes, 414 U.S. 51 (1973)	22
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	28
Luther v. Borden, 7 How. 1 (1849)	21
McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976)	15
Meyer v. Grant, 486 U.S. 414 (1988)	27
National Fire Ins. Co. v. Thompson, 281 U.S. 331 (1930)	5
New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989)	11,21,,22
Oregon v. Mitchell, 400 U.S. 112 (1970)	21,22
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	23

TABLE OF AUTHORITIES

	Page(s)
Reynolds v. Sims, 377 U.S. 533 (1964)	22
Sable Communications v. FCC, 109 S. Ct. 2829 (1989)	23
San Francisco Democratic Cent. Comm. v. Eu, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989)	23,24
Tashjian v. Republican Party, 479 U.S. 208 (1986)	21
Texas v. Johnson, 109 S. Ct. 2533 (1989)	7
Unger v. Superior Court, 37 Cal. 3d 612, 692 P.2d 238 (1984)	10
Unger v. Superior Court, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980), *cert. denied*, 449 U.S. 1131 (1981)	10
Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	12,13,29

Statutes

U. S. Const.	
art. IV, § 4 (Guarantee Clause)	20,21
First Amendment	*passim*
5 U.S.C	
§ 7324 (Hatch Act)	15,16
Supreme Court Rule	
37.2	3
Cal. Const.	
art. II, § 6(b)	*passim*

TABLE OF AUTHORITIES

	Page(s)
Cal. Elec. Code	
§ 10012.1	25
Cal. Rev. & Tax. Code	
§ 18701 *et seq.*	19,20
§ 18702	20

Other Authorities

Culver and Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 Judicature 81 (1986)	27
Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365 (1965)	27
Lee, *The Politics of Nonpartisanship* (1960)	10
McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* (1990)	29
Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677 (1987)	14
Schotland, R., *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 Journal of Law and Politics 57 (1985)	10,14
Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection* Appendix B (1985)	25

TABLE OF AUTHORITIES

	Page(s)
State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State* (1988)	25
Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986)	5

No. 90-769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, ET AL., IN SUPPORT OF RESPONDENTS

INTERESTS OF THE AMICI

The California Democratic Party and its current and immediate past chairs, Philip Angelides and Edmund G. Brown, Jr.; the California Libertarian Party and its chair, Gail Lightfoot; the San Francisco, Los Angeles, Alameda, Santa Clara, Marin, Solano, and Placer County Democratic Central Committees, and the chairs of each of these county central committees; and the San Francisco County Republican Central Committee and its chair, Sam Harper, are interested in preserving and exercising the parties' First Amendment rights

to endorse, support, or oppose candidates running for nonpartisan offices in California.

Carol Sherman, Mayor of Fairfax, Wendy Baker, Councilwoman and former Mayor of Fairfax, Nancy L. Parent, Councilwoman and former Mayor of Pittsburg, Eddie Souza, Mayor of Santa Clara, Lawrence E. Stone, Councilman and former Mayor of Sunnyvale, Dennis Zane, Councilman and former Mayor of Santa Monica, Carole Midgen, member of the San Francisco Board of Supervisors, Mary King, member of the Alameda County Board of Supervisors, and Libby Denebeim, member of the San Francisco Board of Education, are interested in having the right to seek and publicize the endorsements and support of political parties and in promoting responsive local government accountable to the electorate.

The National Committee for Party Renewal and the Northern California and Southern California Committees for Party Renewal are organizations composed of prominent political scientists and political practitioners interested in the rejuvenation of America's political parties. Professors Edmond Costantini and Eugene C. Lee are interested in maintaining the appropriate relationship between political parties and local government.

The Ninth Circuit Court of Appeals granted leave to the above-listed amici to file a brief in support of respondents' Petition for Rehearing and Suggestion for Rehearing En Banc and to participate in the oral argument before the *en banc* court.

Subsequent to the *en banc* court's decision, petitioners moved both the Ninth Circuit and this Court to stay the *en banc* decision. The above-listed amici opposed both motions for stay, which were denied. Consequently, amici political parties were able to, and did, evaluate and endorse candidates running in California's November 1990 nonpartisan elections. On March 15, 1991, amici filed with this court a Motion for Leave to Participate in Oral Argument and For Divided Argument.[1]

SUMMARY OF ARGUMENT

This case concerns the straightforward issue of whether California may permissibly burden the First Amendment free speech and associational rights of California's political parties and their adherents. Article II, section 6(b) of the California Constitution imposes just such a burden by prohibiting political parties from endorsing, supporting, or opposing candidates for nonpartisan office. Myriad decisions of this Court require that where a statute infringes fundamental rights such as free speech, it must be narrowly tailored to achieve a compelling state interest.

Petitioners contend that they are justified in silencing the political parties, primarily relying on asserted interests in the fact and appearance of impartiality in government. Petitioners' argument suffers from an absence of proof: they offer nothing more than speculation to support their claim that without the strictures of section 6(b) in place, endorsements by political parties will significantly erode governmental impartiality. This Court has rejected the notion that a state may preserve the integrity and independence of a group by imposing a ban on what the public may hear. Because section 6(b) does not serve the asserted interest, it must be struck down.

Finally, petitioners cannot demonstrate, as they must, that section 6(b) is the least restrictive means for achieving the end they seek. Petitioners cannot completely foreclose speech based on a naked assertion that nothing less will serve their purpose, where less restrictive measures have not been attempted. Moreover, section 6(b), which targets political

---

[1] Pursuant to Supreme Court Rule 37.2, all parties to this action have consented to amici herein filing this brief in support of respondents. The parties' written consent has been submitted to this Court under separate cover.

parties for their ostensible threat to impartiality, is underinclusive, ignoring the greater threat from the hundreds of political clubs, political action committees, politicians, and monied special interest groups in California, with no logical or factual justification for the distinction.

ARGUMENT

I. SECTION 6(b) IS AN EGREGIOUS BURDEN ON FIRST AMENDMENT RIGHTS AND MUST BE SUBJECTED TO THE MOST EXACTING SCRUTINY

A. Section 6(b) Targets Political Speech, Which Lies at the Core of the First Amendment

This Court has consistently emphasized that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976) (citations omitted). By prohibiting political parties from speaking out on the qualifications of candidates in nonpartisan elections, section 6(b) flies in the face of this precept, forbidding a type of speech which rests "at the core of our electoral process and of the First Amendment freedoms." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1984) (citation omitted).

> We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.

Id. at 223 (citations omitted).

Petitioners' suggestion that speech concerning candidates for *nonpartisan* office merits less protection than speech concerning candidates for partisan office should be firmly rejected. *See id.* ("Free discussion about candidates for public offices is no less critical before a primary than before a general

election"). Regardless of the type of election at issue, a prohibition on endorsements "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Id.*

Indeed, a ban on endorsement in local elections is arguably more injurious to the voters and candidates than it is in national or statewide elections. Local races often involve candidates with little name recognition, and voters, who have little information on which to base their decisions, often welcome the guidance of the party with which they are affiliated. *See Eu* Joint Appendix ("*Eu* J.A.") 85-86 (Fraser Decl. ¶ 9); 106 (Marchioro Decl. ¶ 5).[2] Section 6(b) also burdens the candidate for local office, because she is prevented from telling the electorate that she has been evaluated by a group of well-informed, interested individuals and found worthy of their support.

The Ninth Circuit correctly held that the broad principles articulated in *Eu* applied to political speech in *all* elections:

> [T]here is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

---

[2] Amici refer in this brief to declarations in the Joint Appendix ("*Eu* J.A.") and the Addendum to Motion to Dismiss or Affirm ("*Eu* Add.") filed in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989). "[T]he Court can take judicial notice of matters appearing in the certified or printed appendices or records in the official files of the Court." Stern, Gressman & Shapiro, *Supreme Court Practice* 540 (6th ed. 1986); *see also National Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

Geary v. Renne, 911 F.2d 280, 284 (9th Cir. 1990) (*en banc*), *cert granted* (1991).[3] *See also Brown v. Hartlage*, 456 U.S. 45, 60 (1982). ("It is simply not the function of government to 'select which issues are worth discussing or debating in the course of a political campaign'").

B. Section 6(b) Is a Speaker- and Content-Based Restriction of Speech, and Thus Is Presumptively Invalid

In identifying a type of political speech and "silencing a particular class of speakers with regard to it," California has acted directly contrary to the holding in *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), that political speech may not be prohibited solely on the basis of the speaker or the content. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784-85.

The Court's intolerance of speaker-based restrictions on speech, such as section 6(b)'s prohibition against speech by political parties, is founded on the premise that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." (*Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980)) (quoting *Bellotti*, 435 U.S. at 777). Moreover, contrary to petitioners' central contention that an entity can lose its right to speak if it is given government benefits, this Court has held that a state cannot suppress the speech even of an organization upon which it has conferred a *monopoly*. An entity's receipt of government benefits "does not decrease the

[3] Petitioners' attempt to restrict the foundation for the *Eu* decision to this Court's observation that parties have the right to "communicate with [their] members concerning *[their] own decision-making process*" (*see* Petitioners' Brf. 19 (emphasis in original)) cannot be credited. *Eu* clearly spoke to the central importance of political speech and rested its holding thereon. *See Eu*, 489 U.S. at 222-23.

informative value of [that entity's] opinions on critical public matters" (*Consolidated Edison*, 447 U.S. at 534 n.1), nor does it grant the government license to silence those opinions.

Section 6(b) also offends constitutional precedent in that it suppresses speech based on its content – here, the approval or disapproval of candidates for public office and discussion of the candidates' qualifications. The Court has repeatedly subjected content-based restrictions of political expression to "the most exacting scrutiny." *Texas v. Johnson*, 109 S. Ct. 2533, 2543 (1989) (citation omitted). As Judge Canby accurately observed in dissent from the original Ninth Circuit decision, "[Section 6(b)] is directed at the *content of speech*, in order indirectly to achieve political consequences. That is its prime flaw." *Geary v. Renne*, 880 F.2d 1062, 1085 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) (emphasis added).

C. Section 6(b) Imposes a Substantial Burden on the Associational Rights of Party Members

Eu's rationale – that any law which interferes with a political party's ability to communicate with its members about a candidate's qualifications constitutes a "particularly egregious" burden on its freedoms of speech and association (489 U.S. at 224) – applies with equal force here. *Eu* recognized that political parties are no more than individual citizens banding together to engage in political activity. Thus, by forbidding a party from evaluating candidates and communicating its endorsements to its members, section 6(b) weakens the party at the core of its institutional existence. *Eu* J.A. 125 (Prof. Burns Decl. ¶ 13.); 110-11 (Prof. Ranney Decl. ¶ 9). *See also Eu* J.A. 88 (Gingell Decl. ¶ 4); 91-92 (Hudson Decl. ¶ 5); 101 (Prof. Lee Decl. ¶ 9); 120 (Bone Decl. ¶ 7). Because voters join parties precisely so that they may amplify their political voices through association (*see Eu* J.A. 80 (Fay Decl. ¶ 2); 115 (Sturrock Decl. ¶ 8)), section 6(b) dramatically impinges on First Amendment rights by diminishing the incentive to associate.

To justify burdening the associational rights of party members, petitioners advance a dangerous argument that this case concerns "political power" and the need to contain it. Petitioners' Brf. 7.[4] If parties, through their speech, wield "political power," this fact cannot constitutionally be of concern to California. "[S]peech cannot be prohibited on the ground that it is effective." *Geary*, 911 F.2d at 289 (Reinhardt, J. and Kozinski, J., concurring ("concurrence")). *See also Bellotti*, 435 U.S. at 790 ("The Constitution 'protects expression which is eloquent no less than that which is unconvincing'") (citation omitted). The issue, then, is not "political power," but whether political parties may be silenced. The answer, as indicated by *Eu*, is emphatically "No."[5]

Underlying petitioners' argument is the unspoken premise that political parties are engines of evil. Petitioners ignore the crucial function that political parties serve in our democracy:

> Political parties are an essential element of a strong democracy. The need for political parties is evidenced by their existence in every democracy in the world. A political party is the only organization large enough, open enough, and public enough to give order and direction to a democracy's political life.

---

[4] Even if petitioners' concern were legitimate, colorful stories about corruption at the turn of the century, based largely on an archaic view of party structure, have no bearing on the operation of California's political parties in the 1990s. Contrary to the "party boss" image, to which the Proposition 49 ballot refers seven times, today's county central committees are elected by the voters and hold open meetings. *Eu* Add. 4a (Christman Decl. ¶ 8).

[5] Petitioners also ignore the fact that, by suppressing the speech of and thereby weakening political parties, section 6(b) necessarily increases the "political power" of individual politicians, political clubs, political action committees, special interest groups, and for-profit slate card vendors, all of whom remain free to influence, through speech and contributions, nonpartisan elections. *See Geary*, 911 F.2d at 292 (concurrence).

Eu J.A. 110 (Prof. Ranney Decl. ¶ 6).[6]

II. SECTION 6(B) DOES NOT SERVE PETITIONERS' ASSERTED STATE INTERESTS

Accepting *arguendo* petitioners' asserted interests in maintaining both the impartial administration of government and the appearance thereof, petitioners still must show that section 6(b) is necessary to serve those interests. Petitioners have not made and cannot make that showing.

A. Petitioners Can Point to No Evidence Linking Political Party Endorsements to Corruption, the Loss of Impartial Government, or Any Other Evil

Petitioners warn that a variety of ills will befall California if political parties are permitted to endorse nonpartisan candidates, including party domination of local offices, the undermining of impartial government and of judicial independence, and closure of the electoral field to candidates who "will not toe the party line." *See* Petitioners' Brf. 7. To support their dire predictions, petitioners cite several declarations (*see* J.A. 27-37), filed after the District Court's entry of summary judgment. *See Geary*, 911 F.2d at 305 n.41 (Rymer, J., dissenting). These declarations, as the Ninth Circuit found, are singularly unpersuasive, leaving the record devoid of support for petitioners' grim forecasts:

> We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy,

---

[6] Petitioners' depiction of parties similarly disregards the "many essential functions" that parties serve in our democracy, such as developing political programs and ideas, and increasing voter awareness and participation. *Eu* J.A. 101 (Prof. Lee Decl. ¶ 8); 110 (Prof. Ranney Decl. ¶¶ 6-8).

> and the *State has offered nothing but speculative evidence to support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.*

Geary, 911 F.2d at 285-86 (emphasis added).[7] The concurring opinion, in even stronger language, also remarked on this absence of supporting evidence:

> I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan

[7] While Petitioners concede that there have been no party machine politics in California since 1910, they insist that this state of affairs arises because parties have not endorsed in nonpartisan elections. Petitioners' Brf. 28. Their argument is plainly wrong: the California Supreme Court found that partisan endorsements in nonpartisan races have been "customary" in California (*Unger v. Superior Court*, 37 Cal. 3d 612, 616, 692 P.2d 238 (1984) ("*Unger II*")), meaning that partisan endorsements and nonpartisan elections have co-existed with no resulting corruption or decline in confidence. Petitioners' attempt to discredit this holding of the California Supreme Court (*see* Petitioners' Brf. 26-28) must be rejected.

In reaching this conclusion, the *Unger II* court relied on amici Professor Eugene C. Lee's study, a California Attorney General Opinion, and the declarations filed in *Unger v. Superior Court*, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980) ("*Unger I*"), in which the chairs of the party central committees testified that "their committees had endorsed and/or supported candidates for judicial and other nonpartisan office for many years." 37 Cal. 3d at 616 n.6. The *Unger I* court, in addition to noting that such endorsements were widespread, specifically found that "the practice is widespread in the San Francisco Bay Area." 102 Cal. App. 3d at 684 (footnote omitted).

Lee's study supports the *Unger I* and *Unger II* findings that partisan endorsements have been commonplace in nonpartisan elections. Lee found that such endorsements occurred more frequently in California's populous urban areas than in the sparsely populated rural areas. Lee, *The Politics of Nonpartisanship* (1960) at 102-03. This fact renders petitioners' citation to the *number* of cities which endorsed misleading. *See also* R. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 Journal of Law and Politics 57, 69 (1985) ("Slate mailers in the past were sent out by the parties until a 1980 California Court of Appeal decision barred party involvement in nonpartisan races").

> elections ever, even on a single occasion, led to corruption or evil of any kind – almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.

Id. at 289 (concurrence). *See also id.* at 286 n.5 (no evidence that political parties have significantly influenced nonpartisan elections or threatened public confidence in officeholders). Accordingly, this Court should attach no evidentiary weight to petitioners' declarations. *See New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 702-03 (1989) (Since the courts below are better situated to assess the weight of competing arguments, Court deferred to findings of lower courts that "proffered governmental interests were either invalid or were not sufficient to justify [the infringement of constitutional rights]").

What the evidence does indicate, however, is that California appears to be the *only* state to ban political party endorsements in nonpartisan local elections, and one of only three states to ban endorsements in judicial elections. *See Geary*, 880 F.2d at 1069 n.12; Petitioners' Brf. 10 n.5.[8] The fact that California's endorsement ban is not found in the overwhelming majority of states casts grave doubt on "the weight to be assigned [California's] asserted interests and the extent to which the prohibition in question is necessary to further them." *Butterworth v. Smith*, 110 S. Ct. 1376, 1383 (1990) (constitutionality of Florida law banning grand jury witnesses from disclosing testimony to public). *See also Eu*, 489 U.S. at 226 ("Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary").

[8] Petitioners incorrectly include Florida as a state with a ban on party endorsement in judicial elections. Florida's judicial endorsement ban has been enjoined since the decision in *Concerned Democrats v. Reno*, 458 F. Supp. 60 (S.D. Fla. 1978), in which the court found the ban unconstitutional.

B. A Ban on What the Electorate Can Hear Does Not Serve Petitioners' Asserted Interests in Maintaining the Appearance of Impartiality and Public Confidence in Officeholders and Judges

Petitioners and amicus California Judges Association (the "CJA") advance related interests in the "appearance of impartial justice" (Petitioners' Brf. 14) and in "promoting public confidence in the impartiality" of judges. CJA Brf. 4. Indeed, these interests are the entire focus of the CJA's brief.

The premise underlying petitioners' and the CJA's argument is that information – here, the views of the political parties regarding officeholders' qualifications – must be *withheld* from the electorate because, otherwise, some voters may suspect that parties exact *quid pro quo* arrangements in exchange for their endorsements. This suspicion, following petitioners' argument, will undermine the "appearance of impartial justice" and public confidence in local government.

Petitioners and the CJA overlook applicable First Amendment precedent. A state's strong interest in maintaining the integrity, professionalism, or dignity of a group or profession cannot justify the suppression of speech, even where that speech may undermine the public's perception of the profession. *Boos v. Barry*, 485 U.S. 312, 321-29 (1988); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-71, (1977); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-73 (1976).

Petitioners' asserted interest in the appearance of impartiality and maintaining public confidence in local officeholders is virtually indistinguishable from the asserted interests in maintaining the integrity, professionalism, or dignity of a profession. Local officeholders are no more entitled than pharmacists, lawyers, or foreign diplomats to be insulated from the effects of the free flow of information. Similarly, keeping the electorate in ignorance about the qualifications of local officeholders is no more acceptable, as a constitutional matter, than was keeping consumers in

ignorance in *Bates* or *Virginia Bd. of Pharmacy*. Indeed, since local government so vitally affects the lives of our citizenry, a ban on discussion of local officeholders' qualifications is more pernicious than the bans struck down in *Boos*, *Bates*, and *Virginia Bd. of Pharmacy*.[9]

Where the choice is between more or less information, the First Amendment counsels us to opt for more:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia Bd. of Pharmacy, 425 U.S. at 770. Expanding the debate over political candidates' qualifications can lead only to a more informed voter choice and to increased officeholder accountability.

Finally, contrary to petitioners' implicit assumption, the fact that nonpartisan officeholders in the future might listen to the views of political party organizations *does not* signal either corruption or an undermining of impartial government. Officeholders should be responsive to the views of all voters, *including* the voters who organize themselves into party organizations.[10] *See Geary*, 911 F.2d at 286 n.5. In a

---

[9] Petitioners argue that parties need have no voice in local elections because local government does nothing more than "issue the building permits, fix the potholes and install the 'Slow – Children At Play' signs in front of schools." Petitioners' Brf. 16. Far from performing merely ministerial tasks, however, local government decides such policy issues as taxes, school desegregation plans, slow growth initiatives and rent control. Even in providing municipal services, limited resources can require that local governments make politically charged decisions regarding both the level of services to be provided and the distribution thereof.

[10] Even assuming that removing party labels from nonpartisan candidates serves the appearance of impartiality, section 6(b) does not achieve that purpose. Hundreds of political clubs which incorporate the

democracy, it is up to the *voter* to determine what weight to give endorsements:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

Bellotti, 435 U.S. at 791-92. "The argument that political party electioneering corrupts nonpartisan election systems is just a variation on the paternalistic claim that people should not vote based on party affiliation." Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1695 (1987).

C. Petitioners' Reliance on *Letter Carriers* Is Misplaced

Petitioners attempt to analogize this case to *Civil Service Comm. v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and argue that because *Letter Carriers* recognized an interest in impartial administration of government and section 6(b) supposedly serves that same interest, section 6(b) should be

---

names of major parties would remain free to endorse nonpartisan candidates. *See Eu*, 489 U.S. at 217 n.3; *Eu* J.A. 114 (Sturrock Decl. ¶ 6). Moreover, section 6(b) does not affect "for-profit" vendors which sell space on slate mailers and lead the public to believe that the cards represent official party endorsements by prominently displaying the name and symbol of the Democratic or Republican party, including only a small print disclaimer. *See Geary*, 911 F.2d at 294 (concurrence). These mailers appear to relay information about a candidate's politics; in reality the publisher sells slots on the mailer to the highest bidder:

> [W]hen [a] campaign manager refused to pay a second $15,000 – offering instead only $5,000 – his opponent got the slot for $12,000. One judicial candidate who was not slated by Californians for Democratic Representation commented bitterly that, "There was a bidding war, and I lost, even though I'm a Democrat and he's a registered Republican. You can't believe what an industry this has become . . . and for the candidates, it's blackmail."

Schotland, *supra* p. 11, at 70-71 (citation omitted).

upheld. Petitioners' Brf. 17-19. For several reasons, petitioners' syllogism is fatally flawed.

First, petitioners ignore this Court's statement in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that the Hatch Act restrictions would have been unconstitutional had they been directed at private citizens. *Broadrick*, the companion case to *Letter Carriers*, struck down Oklahoma's "state Hatch Act," noting that "[the statute] is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments." 413 U.S. at 616. *Letter Carriers* itself noted that the government's interest in regulating the speech of government employees "differ[s] significantly" from its interest in regulating the speech of private citizens. *Id.* at 564 (citation omitted). *See also McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 n.6 (1976).

Second, petitioners fail to recognize that the Court decided *Letter Carriers* under a rational basis standard, *not* a compelling interest standard.[11] Petitioners therefore err when they rely upon that case in urging this Court to disregard the adequacy of less restrictive alternatives.

Third, this Court has *rejected* the argument that an interest in impartial government justifies a ban on endorsements. *See Buckley*, 424 U.S. at 27 n.29. In *Buckley*, the government argued that *Letter Carriers* supported a federal restriction on independent campaign expenditures during candidate elections. This Court termed the government's reliance on *Letter Carriers* mistaken, holding that *Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections:

---

[11] The Court has treated *Letter Carriers* as a case in which it upheld, on rational basis review, regulations directed only at government employees. *See Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979) (citing *Letter Carriers* in holding that the regulation at issue would be upheld unless there was "no rational connection" between the regulation and the interest proffered).

> [*The Letter Carriers*] Court repeatedly emphasized the statutory provision and corresponding regulation *permitting an employee to "[e]xpress his opinion* as an individual privately and *publicly on political* subjects and *candidates*." . . . [The *Letter Carriers* Court] carefully declined to endorse provisions threatening political expression.

Buckley, 424 U.S. at 48 n.54 (emphasis added) (citations omitted).

Fourth, the Hatch Act differs dramatically from section 6(b), in that the Hatch Act *furthered* First Amendment interests by preserving government employees' freedoms of association and belief. At the time *Letter Carriers* was decided, a newly elected government official could discharge nonpolicymaking employees based on their partisan affiliation. Government employees thus had much to fear regarding their political affiliation being divulged. *See Broadrick*, 413 U.S. at 606 (Hatch Act restrictions "insur[e] [employee] job security, free from the vicissitudes of the elective process, and [protect] them from 'political extortion'" (citation omitted)). Thus, the Hatch Act was viewed as an attempt to further First Amendment interests:

> [I]n [*Letter Carriers*] it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association. *Subordination of some First Amendment activity was permissible to protect other such activity.*

Elrod v. Burns, 427 U.S. 347, 371 (1976) (emphasis added) (footnote omitted). By contrast, section 6(b) imposes a total ban on the political parties' First Amendment activity, without counterbalancing that incursion by any First Amendment "protective" benefits.

III. PETITIONERS' ASSERTED INTEREST IN ENSURING THAT CALIFORNIA'S POLITICAL PARTIES DO NOT "DISPROPORTIONATELY INFLUENCE" NONPARTISAN ELECTIONS BY COMMUNICATING THEIR VIEWS TO THE ELECTORATE IS INVALID

In their discussion of underinclusiveness, petitioners appear to advance another asserted state interest: "counterbalancing, in the nonpartisan context, . . . [state-conferred] political advantages." Petitioners' Brf. 23. To support this argument, petitioners rely exclusively on *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), where the Court upheld a restriction on corporate expenditures for political purposes. As shown below, petitioners' reliance is thrice flawed.

A. A State Has No Interest in Restricting the First Amendment Activities of Voluntary Political Associations

FEC v. Massachusetts Citizens for Life ("*MCFL*"), 479 U.S. 238 (1986), forecloses petitioners' argument that state-conferred advantages justify first amendment restrictions on political parties. In *MCFL*, this Court considered the constitutionality of a law requiring corporations to use segregated funds when spending money on behalf of candidates. 479 U.S. at 241. *MCFL* held that such a restriction could not be applied to corporations that were *voluntary political associations*, despite the fact that such organizations obviously received substantial state-conferred advantages. *Id.* at 259-63.

MCFL and *Austin* both teach that when a *commercial* organization, through largesse, gains power unrelated to its political popularity, the potential for corruption exists. Political parties do not give rise to the corruption concern of *Austin* precisely because the parties' political power, like that of Massachusetts Citizens For Life, derives directly from their political popularity. A *political* organization does not unfairly exploit its influence when it exercises political power, even if that power derives in part from state-conferred advantages:

> "[Certain groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *That description applies equally well to the political parties targeted by § 6(b).*

Geary, 911 F.2d at 284 (emphasis added) (quoting, with emphasis added, *MCFL*, 479 U.S. at 259).

B. Petitioners Have No Legal Support for the Proposition That "State-Conferred Advantages" Justify Section 6(b)'s Foreclosure of Speech

Petitioners can point to no case holding that state-conferred advantages justify the complete ban on political speech imposed by section 6(b).[12] Petitioners' reliance on *Austin* is expecially anomalous in that *Austin* itself based its holding in part on the fact that the Michigan statute still left open avenues for speech. 110 S. Ct. at 1402 (Brennan, J., concurring) ("The Michigan law at issue is not an across-the-board prohibition on political participation by corporations or even a complete ban on corporate political expenditures"). In contrast to *Austin*, this case concerns whether the state can stop the power of an *idea*, rather than the power of *money*.

C. Petitioners Can Prove No Nexus Between the "State-Conferred Advantages" and the Political Parties' "Power"

Petitioners assert that "[t]he influence and popular support of a California political party are *directly related to its state conferred benefits*." Petitioners' Brf. 25 (emphasis added).

[12] The statute at issue in *Austin* was termed "the most severe restriction on political speech ever sanctioned by this Court" (*Austin*, 110 S. Ct. at 1425-26 (Kennedy, J., dissenting)), yet section 6(b), which flatly prohibits political speech by political parties, constitutes a far greater burden on First Amendment rights than did the *Austin* statute.

However, since all parties receive the same benefits, and since, for example, the California Democratic Party and the California Peace and Freedom Party have grossly disparate influence, it is apparent that the parties' respective influence is attributable to their popularity with voters and not to their receipt of state-conferred benefits. Speech bans are inappropriate if they encompass organizations whose resources are due largely to sources other than government benefits. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (striking down an FCC regulation under which "[a] station that receives only 1% of its overall income from [the government] is barred absolutely from all editorializing").

Indeed, one of petitioners' own declarations – that of Proposition 49 author Richard Mountjoy – attributes the political parties' influence to the parties' diverse memberships and broad agendas, and *not* to their receiving "state conferred advantages."

> Parties are unique. Their power base is much broader than unofficial organizations and special interest groups, and not single issue oriented. An endorsement by a party would have a much greater impact on voters than would the Sierra Club, for example, but would be less informative as to where the candidate stands on local issues.

J.A. 36 (Mountjoy Decl. ¶ 7).

One of the statutes cited by petitioners as a "state conferred advantage" actually *disproves* petitioners' arguments. California Revenue & Taxation Code section 18701 *et seq.* provides that the state of California can collect contributions for the political parties in connection with the state personal income tax returns. Yet section 18702, which articulates the legislative purpose of this provision, indicates that the statute is necessary to rectify the imbalance between political parties and better-financed wealthy individuals and special interest groups:

> The Legislature finds and declares:
>
> (a) Candidates are now frequently dependent on large contributions from *wealthy individuals and interest groups* for campaign financing. Individuals and interest groups who make large contributions thus may *enjoy disproportionate access* to public officials and influence in government decisionmaking. . . .
>
> (b) *This act seeks to reduce candidate dependence* on large contributions and the excessive influence of large contributors, *by providing qualified political parties* with a campaign fund based on small contributions, which fund shall be used to assist candidates under the direction of the state parties and certain of their elected representatives.

Cal. Rev. & Tax. Code § 18702 (emphasis added). It is ironic that petitioners argue that this section, enacted only eight years ago, is "directly" responsible for what petitioners characterize as the threatening influence of the political parties today.

IV. THE GUARANTEE CLAUSE DOES NOT PERMIT CALIFORNIA TO INFRINGE THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS

Petitioners argue in passing that section 6(b) relates to the structure of California's local government, thus implicating interests of federalism and the U.S. Constitution's guarantee of a republican form of government (the "Guarantee Clause"). Petitioners then assert that the Court should balance these federalism interests against the political parties' First Amendment freedoms. Petitioners' Brf. 10-11. Even a cursory review of precedent, however, demonstrates that petitioners' position lacks any merit.[13]

---

[13] Petitioners' invocation of the Guarantee Clause is questionable given the uncertainty over whether the Guarantee Clause grants *any* powers to the states. It has long been held that it is *Congress'* province to enforce the guarantee of a republican government. *See, e.g., Luther v. Borden*, 7 How. 1, 42-44 (1849); *see also Baker v. Carr*, 369 U.S. 186, 223-24 (1962) (discussing cases in which the Court has "refused to resort to the Guaranty clause . . . as the source of a constitutional standard for invalidating state action"). Petitioners' brief conspicuously lacks any citation to case law in which a state law challenged on constitutional grounds has been upheld pursuant to the Guarantee Clause.

First, section 6(b) does not directly promote or protect the interests underlying the Guarantee Clause and general federalism principles. Petitioners correctly assert that the states have the "power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J.). Section 6(b), however, does not concern the nature of California's electoral "machinery" or the structure of local government; rather, section 6(b) dictates who may speak during California's elections. But "the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected." *Geary*, 911 F.2d at 287 (concurrence). Adding the voices of the political parties to the public debate does not alter the nonpartisan structure of California's local elections: for example, the candidates are not pre-selected in party primaries, they do not run under any party label, and ballots do not identify their party affiliation.[14]

Second, section 6(b) trespasses on the fundamental rights of the political parties and their adherents. Even those cases which recognize a state's right to determine its own form of government forbid such infringement. This Court has consistently struck down state structural choices which violate constitutional rights of that state's citizens. *See Morris*,

---

[14] Petitioners have retreated from the position urged in their petition for writ of certiorari and in Judge Rymer's dissent from the *en banc* decision that the "constitutional origin of California's interest in the nonpartisan structure of local government renders that interest compelling *per se*." Pet. for Writ Cert. 6-7. A state's interest is not compelling merely because the state acts pursuant to an explicit constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986).

489 U.S. 688 (1989); *Reynolds v. Sims*, 377 U.S. 533 (1964). Petitioners cite no authority holding to the contrary. Indeed, the first case petitioners cite, *Oregon v. Mitchell*, explicitly holds that a state's electoral machinery must be "within the limits of the Constitution." 400 U.S. at 125.

V. SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE PETITIONERS' ASSERTED INTEREST IN THE IMPARTIAL ADMINISTRATION OF GOVERNMENT

Because section 6(b) affects political expression and participation, it must be narrowly drawn to avoid unnecessary restrictions of constitutionally protected freedoms. *Eu*, 489 U.S. at 221-22; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Kusper*, 414 U.S. at 59. Section 6(b)'s complete ban on speech is not the least restrictive means for promoting the State's asserted interest in the impartial administration of government and therefore must be struck down.[15]

A. Less Restrictive Alternatives Are Available

As found by the District Court and affirmed by the Ninth Circuit, petitioners have made no showing, apart from discredited speculation, that their asserted interest in the impartial administration of government could not be served by alternatives less drastic than section 6(b)'s draconian ban on "core" political speech. *See Geary*, 911 F.2d at 294-95 (concurrence) (suggesting less drastic means to assure an impartial judiciary).

Conceding that they have no "definitive evidence" of harm flowing from political party endorsements, petitioners state

[15] The fact that petitioners measure section 6(b) not against their asserted interest in impartial government but rather against "nonpartisanship," undermines their entire discussion of the "narrowly tailored" requirement. Nonpartisanship *qua* nonpartisanship is *not* an end in itself; it is merely one vehicle for electing officials.

that they need not make a "particularized showing of actual harms," and can rely on the voters' "reasonable belief" in the necessity of the restriction. Petitioners' Brf. 29. This Court recently rejected a similar argument: that the government can justify a speech ban based solely on a belief in its necessity. In *Sable Communications v. FCC*, 109 S. Ct. 2829 (1989), the FCC defended a ban on indecent phone messages as necessary to prevent children from hearing such messages. 109 S. Ct. at 2837. Yet the FCC neither tested alternatives to a speech ban, nor presented the Court with evidence that such a ban was necessary. *Id.* at 2837-38. Instead, the FCC urged the Court to rely upon Congress' unsubstantiated conclusion that nothing short of a complete ban would be effective. *Id.* The Court rejected the invitation. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 2838 (citation omitted).[16]

B. Section 6(b)'s Targeting of Political Parties Is Fatally Underinclusive

Section 6(b), by targeting the speech of political parties for suppression, is invalid for underinclusiveness. If endorsements by political parties pose a threat to impartial government, then endorsements by countless political clubs, political action committees, special interest and pressure groups, politicians, labor unions, newspapers and for-profit slate mailer vendors pose an equal – indeed, a far greater – threat. Many of these entities, as well as powerful individual politicians, are able to raise far more funds than California's official political parties, which the Ninth Circuit has described as "weak and fossilized." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214

[16] The cases cited by petitioners in support of the proposition that they need supply no evidence that section 6(b) is necessary (Petitioners' Brf. 29) did not apply strict scrutiny and thus are inapposite to whether such evidence is required here. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (Court, in upholding obscenity statute, noted that it is improper to scrutinize legislative findings "save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution").

(1989). *See also Eu* J.A. at 101 (Prof. Lee Decl. ¶ 10) ("California political parties are weak organizations"). It makes no sense to suppress the speech of political parties – which have a more diverse membership and which are more accountable than the other groups listed above – while simultaneously permitting all other entities and individuals to endorse candidates in nonpartisan elections. *See Eu*, 489 U.S. at 228 n.18 ("There is no evidence that an endorsement issued by [a party] carries more weight than one issued by a newspaper or labor union"). This distinction renders section 6(b) fatally underinclusive:

> The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and . . . philosophy.

Geary, 911 F.2d at 292-93 (concurrence).

In sum, section 6(b) exclusively targets political parties and turns a blind eye to the myriad special interest groups and politicians who issue endorsements in nonpartisan elections. This distinction without a difference renders section 6(b) fatally underinclusive.[17] *See Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989).

---

[17] Petitioners contend that the underinclusiveness of section 6(b) can be justified because "there is no history of bossism or domination of local government by nonpartisan organizations in California." Petitioners' Brf. 22. Petitioners' assertion represents a conveniently selective view of history. Judge Trott in the original panel decision devoted considerable attention to the "pernicious activity" of the Southern Pacific Railroad. *Geary*, 880 F.2d at 1073. In the *en banc* decision, the concurrence commented upon the anomaly of a "progressive reform" which left the Southern Pacific untouched, a fact which "not only compelled candidates to deal directly with the Southern Pacific and its lobbyists, but made them more dependent on the railroad's contributions." *Geary*, 911 F.2d at 287 (concurrence).

VI. THE ASSERTED INTEREST IN PRESERVING THE IMPARTIALITY OF THE JUDICIARY DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH

Petitioners argue that section 6(b) is necessary to preserve the impartiality of California's judiciary and the appearance of impartial justice. Petitioners' Brf. 13-14. Petitioners misconceive the source of the threat to an impartial judiciary, if indeed such a threat exists. Petitioners also ignore prior rulings of this Court that reject petitioners' asserted interest as inadequate to justify the suppression of political speech.

It is California's decision to elect its judges and thereby to subject its judges to the political process – and *not* the speech concerning those elections – that potentially undermines the interest in judicial independence. *See Geary*, 911 F.2d at 290 (concurrence).[18] California undeniably is free to strike its desired balance between the separate and distinct goals of judicial independence and judicial accountability (*Geary*, 911 F.2d at 294-95 (concurrence)), but, once having done so, must abide by the foreseeable consequences of that trade-off. "The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate." *Geary*, 911 F.2d at 294 (concurrence).[19]

---

[18] Interestingly, both reports relied on by amicus CJA to show "partisan evils" in other states' judiciaries conclude not that parties should be silenced, but that judicial elections should be eliminated. Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection* Appendix B (1985); State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State* 46 (1988).

[19] The California Court of Appeal recently endorsed precisely this point: "Once it is agreed that judges are subject to the electoral process, the electorate should arguably be given as much information as possible upon which to base its vote." *Clark v. Burleigh*, No. H007141, 1991 Cal. App. LEXIS 301, p.18 (6th App. Dist. Mar. 28, 1991) (striking down as violative of the First Amendment California Elections Code Section 10012.1, which

Petitioners also ignore the logical inconsistency inherent in their position:

> [I]t cannot be seriously argued . . . *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who can truly control his destiny – the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible – *and* at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

Geary, 911 F.2d at 290-91 (concurrence) (emphasis in original) (footnote omitted).[20] It is plainly irrational to argue that the cash-rich special interest groups which were so visible during the 1986 California Supreme Court retention election do not undermine the independence of the judiciary while the endorsements of amici political parties – which played no role in this election – most certainly will.[21] Indeed, eliminating

---

First Amendment California Elections Code Section 10012.1, which prohibited judicial candidates from referring to other judicial candidates' qualifications in the voter's pamphlet).

[20] The CJA also fails to justify section 6(b)'s targeting of political parties. The CJA argues that special interest group activity does not threaten judicial independence "[a]s long as contributions are limited, and judges disqualify themselves in appropriate cases involving campaign contributors or opponents." CJA Brf. 15-16. Amici submit that this argument is absurd. A judge endorsed by the National Abortion Rights Advocates is not required to disqualify him- or herself in an abortion case. Yet, understandably, the National Right to Life movement – to paraphrase the CJA brief – "may have reason to doubt whether a court elected as a '[pro-choice] Supreme Court' will treat them impartially." CJA Brf. 12 n.9.

[21] In 1986, numerous special interest groups campaigned for the rejection of Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso, including Crime Victims for Court Reform, State Senator H.

political party endorsements in judicial races will only *increase* candidates' dependence upon large contributions and allow single issue interest groups to define the election agenda. *Id.*

In addition to their logical infirmities, petitioners' arguments about the impartiality interest ignore decisions of this Court holding like interests insufficient to justify the repression of political speech. For example, the Court has held that the state cannot suppress political speech about an election under the guise of preserving the integrity of the election. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (striking down Colorado statute that prohibited paying to have initiative petitions circulated; state had argued that ban was necessary to protect integrity of the initiative process).

Petitioners also ignore this Court's prior ruling concerning the breadth of First Amendment protection for public commentary not only on the performance of judges, but even on the rulings of judges.[22] *See Bridges v. California*, 314 U.S. 252 (1941). In *Bridges*, the trial court held the Los Angeles Times in contempt for publishing editorials concerning judicial cases which had not been finally determined, on the ground that the editorials might influence the lower court's decision.[23] *See*

L. Richardson's Law and Order Committee, and the Pro Life Council. Culver and Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 Judicature 81, 87-88 (1986). The opposition to the three justices raised approximately seven million dollars. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 368 (1986).

[22] The CJA, in an effort to place a more favorable gloss on section 6(b), urges this Court to view that section more as a ban on *monetary support* than a ban on *speech*. *See* CJA Brf. at 7-8. However, it is axiomatic that if a statute bans all First Amendment activity, a court should not evaluate that statute's validity by looking at its effect on the least protected activity proscribed. *See Houston v. Hill*, 482 U.S. 451, 461-67 (1987).

[23] The weakness of the CJA's position is manifested by its citation of the "variety of contexts" in which the Court has invoked the interest of judicial impartiality. CJA Brf. 3. Notably, in none of the cases cited by the CJA did

id. at 259, 273 n.18. The trial judge reasoned that the editorials "tend[ed] to interfere with the fair and orderly administration of justice in a pending case," and that the First Amendment was subordinated to "the public interest in judicial impartiality and decorum." *Id*. at 259.

Bridges rejected the view that judges would be influenced by the desire to gain support or avoid opposition:

> To regard [a threat of future adverse criticism], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor – which we cannot accept as a major premise.

Id. at 273. *Bridges* also rejected the argument that the public needs to be shielded from public commentary concerning judges in order to preserve respect for the judiciary:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion for it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71. *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (upholding a newspaper's right to report on judicial disciplinary proceedings, because "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern" and because the judiciary had "no greater immunity from criticism than other persons or institutions"). By analogy, the state here may not infringe core

---

the Court uphold the abridgement of an individual right, and, *a fortiori*, none so precious as the right to engage in political speech.

First Amendment rights on the speculative assertion that the political parties' speech will cause judges to be less than fair and impartial or will lessen the appearance of impartiality.

If petitioners fear the potential of *quid pro quo* arrangements between judicial candidates and political parties, the constitutionally permissible solution is to forbid *that conduct*, not to suppress speech. *See* McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, 98 (1990) ("[Judicial] candidates are prohibited from promising a quid pro quo for the endorsements they solicit. . . . [A] number of judges have been reprimanded, and others removed from office, for behavior of this kind"). California is free "to require whatever professional standards it wishes" of its judges, but it may not "keep[] the public in ignorance" of constitutionally protected speech. *Virginia Pharmacy Bd.*, 425 U.S. at 770.

In short, section 6(b) is a misguided means of addressing judicial impartiality. Petitioners' real complaint is that judges and other nonpartisan officials are subject to the electoral marketplace and its associated pressures. Section 6(b) impermissibly penalizes amici political parties and the public without addressing petitioners' underlying concern.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Dated: April 3, 1991

Respectfully submitted,

CEDRIC C. CHAO
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER

By Cedric C. Chao
Counsel of Record

Attorneys for Amici Curiae